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FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS

JULY 1, 1982 TO DECEMBER 31, 1982

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FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

RUSSELL STOVER CANDIES, INC.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9140. Complaint, July 1, 1980—Final Order, July 1, 1982

This order requires a Kansas City, Mo. manufacturer, seller and distributor of candy products to cease, among other things, entering into, maintaining, or enforcing any agreement, understanding or arrangement to fix resale prices for its products; suggesting resale prices, by any means, without clearly stating that they are merely suggested; and seeking information relating to recalcitrant retailers. The respondent is prohibited from terminating, suspending or taking any other adverse action against retailers who fail to conform to company's suggested prices; and required to reinstate those retailers who had been terminated for non-conformance to designated prices. The order additionally requires respondent to pay for a survey to ascertain what percentage of its products is sold at manufacturer-designated prices, and to cease suggesting resale prices if that percentage exceeds 87.4%.

Appearances

For the Commission: *Eugene Kaplan, Jayma M. Meyer* and *Warren Josephson.*

For the respondent: *Lawrence R. Brown* and *David Everson, Stinson, Mag & Fizzell,* Kansas City, Mo. and *Tom Franklin,* in-house counsel, Kansas City, Mo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Russell Stover Candies, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the state of Missouri, with its offices and principal place of business located at 1004 Baltimore Ave., Kansas City, Missouri.

PAR. 2. Respondent is now and for some time has been engaged in the manufacture, advertising, offering for sale, sale and distribution of chocolates and other candies ("products") in and affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Respondent's net sales for fiscal years 1978 and 1979 were in excess of $117 and $128 million, respectively.

PAR. 4. Respondent sells and distributes its products directly to more than 18,000 retail dealers, located throughout the United States, who in turn resell respondent's products to the general public.

PAR. 5. In connection with the sale and distribution of its products, respondent:

(a) designates resale prices for all of its products and communicates those prices to its retailers;

(b) has a policy of not dealing with retailers who sell its products at less than the designated resale prices; and

(c) communicates to retailers the policy set forth in subparagraph (b) of this paragraph. [2]

PAR. 6. As a result of the acts and practices set forth in Paragraph Five, respondent's products are sold, with few exceptions, at or above retail prices designated by respondent.

PAR. 7. Respondent has unlawfully contracted, combined or conspired with its retail dealers to fix resale prices and thereby unreasonably restrain trade in the resale of its products within the meaning of Section 1 of the Sherman Act and has, therefore, violated Section 5 of the Federal Trade Commission Act, as amended.

INITIAL DECISION BY

MORTON NEEDELMAN, ADMINISTRATIVE LAW JUDGE

MARCH 16, 1981

I.

STATEMENT OF THE CASE

The complaint in this proceeding, which was issued on July 1, 1980, charges that Russell Stover Candies, Inc. (hereinafter

"Respondent" or "Russell Stover") has violated Section 5 of the Federal Trade Commission Act, as amended, by (a) designating resale prices for its candies and communicating those prices to its retailers; (b) adopting a policy of refusing [2]to deal with retailers who sell its candies at less than the designated prices; and (c) communicating to retailers its policy of refusing to deal with those who sell its candies at less than the designated resale prices.[1] The complaint further alleges that as a result of these practices respondent's candies are sold, with few exceptions, at or above resale prices designated by Russell Stover.[2] These practices are characterized as follows in the charging paragraph of the complaint:

> Respondent has unlawfully contracted, combined or conspired with its retail dealers to fix resale prices and thereby unreasonably restrain trade in the resale of its products within the meaning of Section 1 of the Sherman Act and has, therefore, violated Section 5 of the Federal Trade Commission Act, as amended.[3]

Respondent's answer, which was received by the Secretary of the Commission on August 7, 1980, admits certain jurisdictional facts but denies all of the substantive allegations of the complaint. Respondent asserts as an affirmative defense that the complaint fails to state facts upon which relief can be granted because it alleges a course of [3]conduct that has been approved by the Supreme Court of the United States.

At a prehearing conference held on September 12, 1980, the parties agreed to submit the case on the basis of a stipulated record. The factual stipulation was filed on November 12, 1980, accepted by the Administrative Law Judge, and the record was closed for the receipt of evidence. Thereafter, proposed findings and briefs were submitted. Oral argument on the briefs was heard on March 6, 1981.

The entire evidentiary record in this proceeding consists of Paragraphs 1 through 24 of the Stipulation,[4] which are incorporated below verbatim as the Findings of Fact: [4]

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[1] Complaint, Paragraph Five.

[2] Complaint, Paragraph Six.

[3] Complaint, Paragraph Seven.

[4] The stipulation, which appears in the record as Joint Exhibit 1A through 1P, has 26 paragraphs. Paragraph 25 provides:

> It is further stipulated and agreed that all stipulations set forth in paragraphs 1 through 24 hereof are for the purposes of this proceeding only and are not admissions by Russell Stover for any other purpose nor may they be used against Russell Stover in any other proceeding.

Paragraph 26 relates to the terms of a cease and desist order which Russell Stover would accept should it finally be determined that respondent's practices are illegal.

II.

FINDINGS OF FACT

1. For the purpose of [these findings], the following definitions apply:

a. *Product* means any candy item which Russell Stover manufactures or sells to retailers.

b. *Retailer* means each location of any person, partnership or corporation, not owned by Russell Stover, which purchases candy directly from Russell Stover and resells it to the public.

c. *Designates* or *designated* means the selection by Russell Stover of the prices at which it desires that its retailers sell Russell Stover products.

d. *Retail price* and *resale price* are used interchangeably.

2. Russell Stover Candies, Inc. ("Russell Stover," "Stover" or "Respondent"), is a publicly held corporation organized, existing and doing business under the laws of the state of Missouri. Respondent's principal office and place of business is 1004 Baltimore Ave., Kansas City, Missouri.[5]

3. In fiscal years 1978 and 1979, Russell Stover had net sales of approximately 117.0 and 128.8 million dollars, respectively, and net incomes of 10.9 and 14.6 million dollars, respectively.[6]

4. Russell Stover's manufacturing plants are located in Lincoln, Nebraska; Marion, South Carolina; Clarksville, Virginia; Montrose, Colorado; and Cookeville, Tennessee. It has warehouse facilities at these five plants and at Allentown, Pennsylvania; Norcross, Georgia; Dallas, Texas; Aurora, Colorado; Indianapolis, Indiana; Olathe, Kansas; and North Sacramento, California. [5]

5. Russell Stover sells and ships its products from these factories and warehouses to more than 18,000 retailers. These stores, primarily drug, card and gift and department stores, are located in every state and the District of Columbia.[7]

6. Russell Stover is therefore engaged "in commerce" and its business activities "affect commerce" within the meaning of the Federal Trade Commission Act.[8]

7. Russell Stover is one of the major United States manufacturers of boxed chocolates.

8. Russell Stover competes with, among other companies, Whitman's, Schrafft Candy Company, Fanny Farmer Candy Shops, Inc.,

[5] See also Complaint and Answer, Paragraph One.
[6] See also Complaint and Answer, Paragraph Three.
[7] See also Complaint and Answer, Paragraph Four.
[8] See also Complaint and Answer, Paragraph Two.

Barton's Candy Corporation, Fannie May Candy Shops, Inc., M & M/Mars and E.J. Brach & Sons, some of which are also major United States manufacturers of boxed chocolates.

9. Russell Stover manufactures or sells to retailers more than sixty (60) seasonal and nonseasonal candy items, including boxed assortments, candy bars, hard candies, bulk candies and other confectionary items.

10. Russell Stover has more than 3,000 full-time employees.

11. Russell Stover employs approximately eighty field sales personnel.

12. The "agency division" manages the sale of Russell Stover candy to card and gift shops and drug stores. The "department store division" manages the sales of Russell Stover candy to department stores.

13. The agency division is organized into five geographic districts. Each district is serviced by a district manager and approximately fifteen sales representatives. The sales representatives report weekly to their district manager; and in turn the district managers report weekly to sales administrators located in Kansas City at the company's headquarters.

14. The sales representatives each service between 200 and 300 retailers and visit each retailer at least four times a year for normal, legitimate business purposes. **[6]**

15. The department store division is organized into two regions. Each region is serviced by a manager located in Kansas City, Missouri, and three district managers located in the region.

16. Russell Stover's corporate management supervises the sales personnel in order to assure implementation of all of the company's sales policies.

17. Russell Stover designates resale prices for all of its products. Stover communicates those prices to retailers by price lists, invoices, order forms and pre-ticketing all of its products.

18. All Russell Stover retailers are thus aware of the prices designated for each Stover product.

19. Russell Stover announces to each prospective retailer before an initial order is placed that among the circumstances under which Stover will refuse to sell are: whenever Stover reasonably believes that a prospective retailer will resell Stover products at less than designated prices; and whenever an existing retailer has resold Stover products at less than designated prices. These circumstances are widely and generally known to Stover retailers. Stover, however, neither requests nor accepts express assurances from prospective or existing . retailers respecting resale prices. Other circumstances

under which Russell Stover refuses to sell are not related to resale prices and are not relevant for purposes of this case.

20. Consistent with the announced policy described in paragraph 19, Stover has refused to open retailers which it thought would sell its products at less than designated prices and has ceased selling to existing retailers because they sold Stover products at less than designated prices.

21. The practices and policies described in paragraphs 17, 18 and 19 existed for a period of at least five years before issuance of the complaint by the Federal Trade Commission in this matter. Refusals and terminations referred to in paragraph 20 have also occurred during this five year period.

22. Stover officers are aware that the vast majority of retailers regularly sell and have sold Russell Stover candy at or above prices designated by Stover. However, the company has not collected or received data from which to accurately determine the degree of adherence to its designated prices. Therefore, the Federal Trade Commission contracted with Louis Harris and Associates, Inc., ("Louis Harris") to conduct a survey to ascertain retail prices and related information concerning Stover candy sold by Stover's retailers. Louis Harris is qualified to conduct this type of survey. [7]

23. The Louis Harris official responsible for the conduct of the survey would be qualified as an expert witness in the field of statistics and survey research and would testify:

a. That the survey was conducted in April 1980, in accordance with accepted and established procedures and techniques designed to insure accuracy, reliability and statistical validity and using a random sample of 819 retailers;

b. That Louis Harris collected data on which 47 specified nonseasonal products were available for sale at each retailer;

c. That Louis Harris collected data on the price at which each product was available for sale at each retailer; and

d. That based on the data collected, 97.4% of the products available were priced at or above the price designated for each product.

Respondent would not offer evidence to rebut that testimony.

24. A number of witnesses would testify that they represent a substantial number of retail locations in which Russell Stover products are currently sold, that they desire regularly or occasionally to sell Stover products in those locations at less than designated prices, and that they do not do so because of the price-related refusal to sell announcement referred to in paragraph 19. Respondent would not offer any evidence to rebut that testimony. [8]

III.

DISCUSSION

Over 60 years ago in *Colgate,* the Supreme Court upheld a district court decision quashing a criminal price-fixing indictment which merely alleged that a manufacturer refused to sell to dealers who sold below the manufacturer's suggested retail prices. In the course of sustaining the lower court determination that the indictment had failed properly to charge an illegal agreement, the Supreme Court said:

> In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.[9]

Colgate itself involved resale price maintenance or vertical price-fixing, and subsequently the case has been followed in those rare instances in which a nonmonopolistic manufacturer did no more than announce in advance its suggested prices, and dealers either acquiesced in the manufacturer's policy, or were cut off if they did not. Thus relying on *Colgate,* it has been held that if all that is involved is an announcement of pricing policy and compliance with that policy, the essential element of a conspiracy case is missing, namely, [9]there is no *agreement* between manufacturer and dealer which obligates the dealer to resell at prices suggested by the manufacturer. *Quinn v. Mobil Oil Co.,* 375 F.2d 273 (1st Cir. 1967); *Dart Drug Corp. v. Parke, Davis & Co.,* 344 F.2d 173 (D.C. Cir. 1965); *Klein v. American Luggage Works, Inc.,* 323 F.2d 787 (3d Cir. 1963).

Complaint counsel have come up with a test case which has as its purpose a direct challenge to the continued viability of *Colgate.*[10] According to the stipulated record, Russell Stover, a manufacturer of boxed chocolates and other candies, announces in advance that it will refuse to deal with retailers who resell below designated prices appearing on lists, invoices, order forms, and respondent's boxed candy which is all preticketed. In carrying out this policy, respondent does not sell initially to retailers who it believes will sell at less than designated prices, and eliminates established retailers whenever it becomes apparent that they have sold Russell Stover products

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[9] *United States v. Colgate & Co.,* 250 U.S. 300, 307 (1919).

[10] Address by Benjamin S. Sharp, Assistant Director for Regional Operations of FTC Bureau of Competition, Vertical Restraints And the FTC: Finding Pro-Competitive Answers to Today's Enigmas, at 4, ALI-ABA Course of Study, "The FTC After The Storm" (Washington, D.C., Nov. 21, 1980) ("The *Russell Stover* case was pleaded as a Sherman Act § 1 violation alleging the existence of an agreement, so as to confront directly the *Colgate* doctrine").

at less than designated prices. This policy is effective in accomplishing respondent's objective. A reliable survey shows [10]that Russell Stover candy is almost universally sold at respondent's designated prices.

While Russell Stover's announcement accomplishes its purpose—to assure sales at designated prices—and respondent's volume of business is not insubstantial, there is nothing in the record about the size of respondent's market share, or the uniqueness of its products, or the importance of the products to retailers who stock the Russell Stover line along with a large variety of other products. In effect, *Colgate* notwithstanding, complaint counsel are pressing the proposition that respondent's practices are illegal *per se* under the Sherman Act on the theory that respondent's announcement and the subsequent acquiescence of the dealers constitutes a vertical agreement to fix retail prices.[11]

Complaint counsel's effort to dispose of the *Colgate* doctrine, which says the exact opposite, that is, that no agreement or conspiracy may be inferred solely from an announcement of a pricing policy followed by compliance with that policy, proceeds on several grounds. First, complaint counsel make much ado about the procedural provenance of *Colgate,* especially the purported difference between the holding and the dictum of the [11]case. According to complaint counsel, the Supreme Court never directly ruled that the manufacturer and the dealers had not engaged in a conspiracy; the Court merely upheld a district court decision sustaining a motion to quash an indictment for failure properly to charge an agreement. But even if complaint counsel are correct, and the Court's limited responsibility under the Criminal Appeals Act could have been discharged without promulgating the *Colgate* doctrine, the significance of these humble beginnings is obscure. That there is a body of law known as the *Colgate* doctrine ("a basic part of antitrust law concepts since it was first announced in 1919" and "part of the economic regime of the country upon which the commercial community and the lawyers who advise it have justifiably relied"[12]) cannot be gainsaid—the very point of this case is to have the doctrine thrown out.

Second, complaint counsel cite a string of cases which have held that the express agreement, which apparently both lower and upper courts were looking for in *Colgate,* is not now required in order to establish a conspiracy. As complaint counsel would have it, since it is well-accepted under modern conspiracy law that no explicit agree-

[11] Section 1 of the Sherman Act prohibits "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . ." 15 U.S.C.A. 1.

[12] *United States v. Parke, Davis & Co.,* 362 U.S. 29, 49, 57 (1960) (Harlan, J., dissenting).

ment is necessary, a tacit conspiracy should be inferred from Russell Stover's prior [12]announcement of its policy, and the subsequent acquiescence in that policy by retailers.

While complaint counsel are undoubtedly right about the ability of the courts and the Commission to draw inferences of conspiracy from interdependent conduct implicating competitors, this argument overlooks the point that since *Colgate* a vertical price-fixing agreement (an agreement between non-competing supplier and customer) is exactly what may not be inferred if all that the record shows is a manufacturer's announcement of a refusal to deal with non-complying dealers. Moreover, contrary to the position of complaint counsel, *Colgate* has not been interpreted as applying only to those instances in which there is no express agreement. Almost from the time the doctrine was first announced, it has been the rule that a unilateral announcement standing alone cannot be used to establish *any* agreement, implied or express. *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U.S. 208 (1921).

Since this gap in the law relating to inferential evidence of conspiracy is premised on the right of traders to pick and choose their customers at will, by definition it applies only to policies originating with a manufacturer, as alleged in the instant complaint. There is nothing in the doctrine which shelters any form of horizontal pricing arrangement among competing dealers, no matter how such an arrangement may have come about. Undoubtedly with this limitation in mind, [13]complaint counsel argue next that Russell Stover has put together a horizontal combination by extending to its dealers an invitation to sell at designated prices. According to complaint counsel, this horizontal combination is consummated when the dealers signal (by compliance) acceptance of the invitation in contemplation that similarly situated retailers will do the same. Putting aside some obvious difficulties with the application of this theory to this case—there is no horizontal conspiracy at any level alleged in the complaint, and the pricing policy at issue here did not originate with the dealers, *see, e.g., Interstate Circuit, Inc. v. United States,* 306 U.S. 208 (1939)—no court has yet invoked the rationale of "invitation and acceptance" to hold that a declaration of pricing policy initiated by the manufacturer represents an invitation to dealers to participate in either a vertical or horizontal price-fixing agreement forbidden by the Sherman Act. To the contrary, when a similar argument was last presented to the Third Circuit, the court concluded that there was neither an agreement nor an invitation to agree. *Klein v. American Luggage Works, Inc.,* 323 F.2d 787 (3d Cir. 1963).

Klein is consistent with the Supreme Court's ruling in *Parke, Davis* that a seller's pricing announcement which engenders "confidence in each customer that if he complies his competitors will also" is *not* a basis for inferring agreement if the manufacturer takes no affirmative coercive action to achieve [14]compliance. *United States v. Parke, Davis & Co.*, 362 U.S. 29, 46 (1960). As for *United States v. Bausch & Lomb Co.*, 321 U.S. 707 (1944), which relies on both *Interstate Circuit and Colgate,* more was involved there than just acquiescence of wholesalers in Soft-Lite's published resale price list. At issue was a multi-level system and a combination which arose when "[t]he wholesalers accepted Soft-Lite's proffer of a plan of distribution by cooperating in prices, limitation of sales to and approval of retail licensees." 321 U.S. at 723.[13]

Turning from its misplaced reliance on conspiracy cases which either included horizontal activity or did not involve mere unilateral announcements originating with manufacturers, complaint counsel say that the *Colgate* doctrine itself has been whittled down, or as complaint counsel would have it, overruled, by a series of cases in which the courts have held that from coercive conduct which goes beyond *Colgate* [15]it will be inferred that the retailers did not act independently, but instead were compelled to agree to resell at the manufacturer's prices. While the Supreme Court has never satisfactorily explained why coercion which induces acquiescence is stronger evidence of agreement than just acquiescence itself, the post-*Colgate* cases have largely evolved into an exercise in finding some element of coercion, however slight it may be, which can be identified as the triggering device for an agreement.[14] Under this line of cases, the doctrine is not available if the manufacturer threatens a price-cutter, and then resumes selling subject to the tacit or implied understanding that the reformed dealer will toe the pricing line. *Parke, Davis & Co.*, 362 U.S. at 34–35, 45 n.6. Nor is the doctrine available if the manufacturer sets up a policing mechanism to uncover violations, and then reinstates price-cutters who satisfactorily demonstrate a willingness to comply with designated prices in the future. *FTC v. Beech-Nut Co.*, 257 U.S. 441, 450–451 (1922). Similarly, if the manufacturer uses customers at one level of distribution to coerce price compliance by dealers at another level of

[13] The *Interstate Circuit* rationale may apply if the manufacturer solicits compliance in the form of an understanding from retailers that they will not discount if others likewise agree. In those circumstances, however, the "invitation-acceptance" concept seems hardly necessary since there exists an agreement between manufacturer and retailer although expressed in conditional terms. *See Parke, Davis* 362 U.S. at 35–36, 46–47. As I indicate later in this discussion, the "unfairness" jurisdiction of the Commission under Section 5 might have been invoked to charge respondent with using an invitation and acceptance in putting together an anti-competitive arrangement among retailers without regard to whether a Sherman Act "agreement" was proven. See discussion, *infra*, at n.24.

[14] *Simpson v. Union Oil*, 377 U.S. 13, 16 (1964) (". . . it matters not what the coercive device is.")

distribution, *Parke, Davis,* 362 U.S. 29 at 45–46, or if the manufacturer uses the threat of its own direct competition or retaliation from others [16]to obtain compliance, *Colgate* does not apply. *Albrecht v. Herald Co.,* 390 U.S. 145, 150 n.6 (1968). The results in the "coercion" cases are also supportable on the alternative theory that in a multi-level distribution system the wholesaler or jobber who either cooperates by informing on price-cutting retailers, or refuses to resell to such retailers, should be considered as forming the requisite combination with the manufacturer. *Beech-Nut,* 257 U.S. at 454–455; *Bausch & Lomb,* 321 U.S. at 723; *Parke, Davis,* 362 U.S. at 45–46.[15]

Going beyond coerced acquiescence or inferences of combinations following multi-level coercion or cooperation, several cases have suggested that the business setting alone may create a coercive environment which induces an agreement or combination and thereby shuts off recourse to *Colgate.* To illustrate, if a car muffler or newspaper franchisee who for all practical purposes is dependent for his livelihood on one source which cannot be easily substituted, and after investing money and effort in developing a market is given to understand that his supplier is firm and resolute in its insistence on observance of stated prices (say, by evidence of a strict policy [17]of cancellations), it is doubtful that the dealer's "independence" is very real, and under these circumstances, too, the *Colgate* doctrine may not apply. *See, Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 142 (1968); *Albrecht,* 390 U.S. at 150 n.6.[16]

The cases discussed above have the effect of severely limiting the *Colgate* doctrine to its precise terms. Not content with this result, complaint counsel settle on *Parke, Davis* as purportedly overruling *Colgate, "de facto".* Given the language in *Parke, Davis* which explicitly discourages such an interpretation ("So long as *Colgate* is not overruled . . ." 362 U.S. at 44),[17] complaint counsel might have argued more persuasively that the following discussion in footnote 6 of *Albrecht,* rather than *Parke, Davis,* accomplished the deed: [18]

Under *Parke, Davis* petitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price. Likewise, he might successfully have claimed that respondent had

[15] See also *Cernuto, Inc. v. United Cabinet Corp.,* 595 F.2d 164 (3d Cir. 1979), which held that a combination may be found in a single-level distribution system on the basis of a refusal to deal following complaints from the competitor of a discounter. This activity was characterized as primarily horizontal in nature as contrasted with a manufacturer's unilateral refusal to deal protected by *Colgate.* 595 F.2d at 167 n.12.

[16] In *Yentsch v. Texaco, Inc.,* 630 F.2d 46 (2d Cir. 1980), it was held that a jury could reasonably infer a combination from the following facts indicative of a coercive environment: the dealer's business was subject to a one year lease with Texaco; the dealer was threatened with cancellation unless prices were maintained; and surveillance was undertaken to determine what prices were being charged.

[17] Complaint counsel explain away this "troublesome dictum" as indicative of the Supreme Court's hesitancy "to expressly overrule its past decisions." (Brief for Complaint Counsel at 45). See, however, *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977)

combined with other carriers because the firmly enforced price policy applied to all carriers, most of whom acquiesced in it. See *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 372 (1967).[18]

While footnote 6 comes perilously close to overruling *Colgate,* the citations to *Parke, Davis* and *Schwinn,* both of which expressly affirmed *Colgate,* indicate that this is not what the Supreme Court intended. The Court seems, instead, to have carved out the barest sliver of permissible conduct—a simple, unadorned, unilateral announcement followed by a refusal—while indicating that the doctrine is not available if compliance is brought about by any affirmative action exceeding an announcement, such as the coerced agreements and multi-level threats in *Parke, Davis,* or the coercive pressures brought to bear on franchisees who are especially vulnerable to the danger of termination, as in *Albrecht* itself and *Schwinn.*[19] This [19]reading of footnote 6 is also consistent with the recent action of the Court in again turning to *Colgate* to reaffirm the right of a trader "freely to exercise his own independent discretion as to parties with whom he will deal." *Reeves, Inc. v. William Stake,* 48 U.S.L.W. 4746, 4749 (U.S. June 19, 1980).

While the exercise of the discretion "as to parties with whom he will deal" may take the form of an announcement of a refusal to deal with price-cutters, there is now so little left of *Colgate,* that the doctrine might not even apply to the actual facts of the *Colgate* case itself. There, coerced acquiescence or an agreement could have been inferred from use of "suspended lists," and requests to offending dealers for assurances or promises of future adherence to prices. *Colgate,* 250 U.S. at 303. In contrast, the instant stipulation tracks [20]the precise terms of the doctrine, rather than the facts of the earlier case, and avoids any mention of tactics (surveillance, investigations, suspended lists, wholesaler boycotts, threats to non-compliers, or solicitation of promises of future adherence), or

[18] *Albrecht,* 390 U.S. at 150 n.6.

[19] By the time it reached the Supreme Court *Schwinn* did not involve resale price maintenance; however, the case has been cited for the proposition that vertical agreements (there customer and territorial restraints) may be grounded upon "the communicated danger of termination" and a "firm and resolute" insistence upon observance of the manufacturer's policies. 388 U.S. at 372. The concurring and dissenting opinion of Mr. Justice Stewart takes issue with this formulation because on its face it offends *Colgate.* 388 U.S. at 391 n.12. Since the majority reaffirmed *Colgate,* it must be assumed that the Court believed that Schwinn had gone beyond a mere unilateral announcement of policy. As it happens, there is some evidence that Schwinn obtained actual agreements, or at least explicit approval, from the distributors. 237 F. Supp. 323, 340–342 (N.D. Ill. 1965). But even without this evidence, Schwinn's announcement of its territorialization policies may have been deemed to be coercive in the context of its cancellation of thousands of dealers and its decision to concentrate distribution among a relatively small group of franchisees. Those who remained on Schwinn's dealer rolls stood to gain enormously from the bicycle boom, and although the Supreme Court may believe that all bicycles are interchangeable, many dealers may have been reluctant to lose the Schwinn brand which they had promoted extensively. 388 U.S. at 365. While the Court does not dwell in *Schwinn* on the coercive element implicit in some franchising situations, it is significant that just one year later it expressed deep skepticism about how "perfectly free" franchised dealers are to reject the demands of a supplier when their very livelihood is at stake. *FTC v. Texaco,* 393 U.S. 223, 229 (1968).

economic facts (such as unique or even significant contribution of respondent's candy to profitable drug store, department store, greeting card shop, or gift shop management) from which it might have been possible to infer coercion or even a coercive atmosphere.

Having failed to present an adequate factual background respecting the product or the market from which an element of coercion may have been inferred, complaint counsel then attempt to resurrect the coercion point by asking that an inference of coercion be drawn from the announcement itself plus the evidence of compliance, which in the case of some dealers would not have occurred except for the existence of the announcement. But the very point of the cases which have followed *Colgate* is that a mere announcement of pricing policy followed by compliance does not constitute a coerced agreement. And although *Schwinn, Albrecht,* and *Perma Life* may signal a further erosion of the *Colgate* doctrine in the peculiarly coercive atmosphere of a franchise relationship revolving around a retailer's essential product, the burden is still on complaint counsel to supply, at the very least, the elements of such an environment. If, on the other hand, all that is provided is a [21]stipulation saying that retailers were induced to comply *"because of the price-related refusal to sell announcement"*[20] there is simply no Sherman Act agreement under *Colgate,* irrespective of how whimsical it may be to have the presence or absence of an agreement turn on whether there was an announcement (or, if you will, an exhortation) followed by compliance, or coercion (or a coercive atmosphere) followed by compliance, or an explicit or tacit contract (either coerced or induced) which requires no showing of compliance at all. *See Parke, Davis,* 362 U.S. at 44.[21]

From the foregoing discussion, it is plain that in order to bring respondent's practices within *Colgate* not only did it require a stipulation which limited the reason for dealer compliance to *"the announcement,"* but some suspicious gaps [22](in addition to the dearth of hard facts about the importance of respondent's product to dealers) were necessary to keep it there. For without such gaps it is doubtful that in the real world even a single-level resale price maintenance program implemented merely by an announcement can be carried out without running afoul of the *Colgate* exceptions.

[20] Finding 24 (emphasis added).

[21] *See also Gray v. Shell Oil Corp.,* 469 F.2d 742, 748 (9th Cir. 1972) ("The distinction . . . between coercion on the one hand and exposition, persuasion, and argument on the other is firmly embedded in the decisional law on vertical price fixing"). Irrational as this formula may be for distinguishing agreement from unilateral conduct, it has a grain of pragmatic justification: the exceptions to *Colgate* are all grounded on external facts which are susceptible to objective proofs (what the manufacturer actually did, and market conditions); in contrast, *Colgate* still protects a manufacturer against a contentious or cancelled dealer who could always claim in a treble damage suit that the unilateral announcement itself was enough to fix prices, a claim which inevitably would involve the trier of the facts in considering elusive, subjective evidence of what went through the dealer's mind before he decided to charge the suggested price.

Pitfalls may exist, for example, in any attempt to deal with the problem of dealer cancellation. If cancelled dealers are replaced by newcomers who know that they are substituting for mavericks, and these substitutes in turn comply with Russell Stover's designated prices, it may be proper to infer that the replacements have agreed, minimally, not to repeat the transgressions of their banished predecessors. *See, e.g., Albrecht,* 390 U.S. at 147–148, 150. The stipulation does not address the issue of substitutes, and I have decided not to draw the necessary inference because the case has been submitted and accepted on the clear understanding that the stipulated facts would constitute the entire evidentiary record.[22] Besides, the complaint and stipulation are directed at the mere announcement and subsequent compliance without regard to any complications which may arise from cancellation and replacement of those who do not comply. **[23]**

Even more egregious than the omission respecting replacements is the absence from the stipulation of certain essential facts concerning respondent's method of doing business. This became apparent during oral arugment when complaint counsel acknowledged that Russell Stover operates company-owned stores, a point never mentioned in the stipulation.[23] There is, of course, nothing in *Colgate* which condones the use of any device which contributes to horizontal price-fixing, including an announcement by a manufacturer-retailer which may be said, at the very minimum, to tamper with competition from retail competitors. This omission suggests that a record which *accurately* reflected respondent's business may never have reached the issue of the continued viability of *Colgate.* It also suggests that the importance of the survival or demise of *Colgate* may have been overstated by complaint counsel since apparently it requires a fanciful setting, unrelated to business reality, in order to be able to test the doctrine. In any event, as I have indicated earlier, I am bound by the stipulation, although I recognize that the result in this case may have been different had the complaint attacked respondent's actual method of doing business, rather than the stipulated lawyer's construct which has been lovingly nurtured like a hothouse flower, but which has little to do with the real world. **[24]**

My decision is further limited by the way in which the complaint scrupulously avoids any of the rubrics associated with the unfairness

[22] Order Receiving Stipulation And Closing The Record (Nov. 14, 1980). *See Verkouteren v. District of Columbia,* 346 F.2d 842 (D.C. Cir. 1965) for binding effect of factual stipulations.

[23] Tr. 36.

jurisdiction of the Commission. Conceivably, Section 5 of the Federal Trade Commission Act[24] might have been invoked to charge that even apart from any Sherman 1 agreement, Russell Stover's practices have the effect of putting together an anti-competitive arrangement among retailers which may be in violation of the spirit of the Sherman Act, *Atlantic Ref. Co. v. FTC,* 381 U.S. 357 (1965), or may be an incipient violation of the letter of the Sherman Act, *FTC v. Motion Picture Advtg. Serv. Co.,* 344 U.S. 392 (1953), *Fashion Originators Guild v. FTC,* 312 U.S. 457 (1941), or may be an unfair method of competition, irrespective of any violation of the letter or spirit of the Sherman Act, *FTC v. Sperry & Hutchinson Co.,* 405 U.S. 233 (1972). But all that the complaint alleges is that respondent's announced pricing policy and compliance with that policy is a *per se* Sherman 1 contract, combination, or conspiracy "and therefore" violates Section 5 of the Federal Trade Commission Act. That complaint counsel want no part of Section 5 is made plain in the following disclaimer: **[25]**

> The complaint makes no charge that, in the alternative Russell Stover's conduct is an unfair method of competition in violation of § 5 independent of the Sherman Act. If this court finds that Russell Stover's conduct does not meet the Sherman Act's requisite elements, it should not find a violation based on the more lenient § 5 standards.[25]

In sum, it required a wittingly incomplete stipulation and a skeletal complaint to set this case into such a mold that (a) it would directly confront *Colgate,* and (b) it could not be decided on any other basis except *Colgate.* Further controlling the disposition of this case, at least at the present stage, is the modest mandate of an administrative law judge: I am confined to setting out the record facts and applying existing precedent to those facts in light of the complaint. This mandate does not include changing the rules of conspiracy law even if the law contains a curiosity which disallows an inference of agreement on grounds that are neither logically convincing to most lawyers nor especially useful to most businessmen. In other words, my reservations about the doctrine notwithstanding, a case which is forced into the four corners of the *Colgate* doctrine, and charges a Sherman 1 violation, is governed by *United States v. Colgate & Co.,* 250 U.S. 300 (1919).

In reaching this result, I have not adopted the argument advanced by respondent that *Colgate,* the one possible exception to the general ban on resale price maintenance, should **[26]**be treated with renewed

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[24] Section 5 of the Federal Trade Commission Act prohibits "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices affecting commerce . . . ." 15 U.S.C.A. 45.

[25] Comp. Counsel Brief at 30 n.95.

deference because of recent academic comment celebrating the virtues of vertical price-fixing as a means of shielding "retailers from intraband competition so that they can provide desirable services and advertising and thereby increase interbrand competition." (Brief for Respondent at 33). But for *Colgate,* respondent's practices, *even as stipulated,* would be a *per se* violation of the antitrust laws without regard to alleged justifications such as the "free rider" rationalization, efficiencies, effects, or the assumed identity of interests between manufacturers and retailers. *California Liquor Dealers v. Midcal Aluminum,* 445 U.S. 97 (1980); *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911).

IV.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over respondent and the subject matter of this complaint.

2. According to the stipulated record, respondent does no more than exercise its own independent discretion as to parties with whom it will deal, announce in advance the circumstances relating to price under which it will refuse to sell, and cancel those who do not comply with the announcement. [27]

3. Although respondent's practices produce compliance with its designated prices, under *Colgate,* the stipulated facts do not establish that respondent has unlawfully agreed, contracted, combined, or conspired with its retail dealers to fix resale prices, and thereby unreasonably restrained trade in the sale of its products within the meaning of Section 1 of the Sherman Act or Section 5 of the Federal Trade Commission Act, to the extent that Section 5 merely registers violations of the Sherman Act.

Accordingly, the following order should be issued:

ORDER

The complaint is dismissed.

OPINION OF THE COMMISSION

BY PERTSCHUK, *Commissioner:*

The complaint in this matter alleges that Russell Stover Candies, Inc. ("Stover") combined with its retail dealers to fix retail prices in violation of Section 5 of the Federal Trade Commission Act. The

Administrative Law Judge ("ALJ") found that the complaint should be dismissed on the grounds that, under *United States v. Colgate,*[1] the respondent had not combined with its dealers. For the reasons discussed below, we reverse the decision of the ALJ [2]and find that Stover has violated Section 5. In accord with the stipulation of the parties, we have entered the order appended to our opinion with one modification.

I. THE FACTUAL RECORD

The entire evidentiary record in this case consists of Paragraphs 1 through 24 of a stipulation by respondent's and complaint counsel. (JX #1A–1P, IDF 1–24)[2] These are restated in full in the initial decision. (ID 4–7) We adopt these as the conclusions of fact of the Commission. In summary, the essential stipulated facts established that Stover is a manufacturer of candy which distributes its products through over 18,000 retail dealers located in every state and the District of Columbia. Stover is one of the largest United States manufacturers of boxed chocolates with sales of approximately $117 million in fiscal year 1978 and 125.8 million in fiscal 1979.

Stover designates resale prices for its products through price lists, invoices, order forms and pre-ticketing.[3] All of its dealers are aware of the designated prices. [3]Stover announces to prospective retailers before an initial order is placed that, among the circumstances under which it will refuse to sell, are whenever it reasonably believes that a prospective retailer will sell the company's products at less than designated prices and whenever an existing retailer has resold the company's products at less than designated prices. These circumstances are widely and generally known to Russell Stover retailers. The company neither requests nor accepts express assurances from prospective or existing retailers respecting retail prices. Consistent with this policy, Russell Stover has refused to begin dealing with retailers it thought would sell at less than designated prices and it has stopped selling to existing retailers because they sold at less than

[1] 250 U.S. 300 (1919).

[2] See JX–¶26.

The following abbreviations are used in this opinion:

I.D. – Initial Decision Page No.
I.D.F. – Initial Decision Finding of Fact No.
CAB – Complaint Counsel's Appeal Brief Page No.
RAB – Respondent's Appeal Brief Page No.
CRB – Complaint Counsel's Reply Brief Page No.
JX – Joint Exhibit

[3] The term "designating" was used in the stipulation rather than "suggesting" in order to reflect Russell Stover's pricing policies. (CAB 2) This pricing policy is discussed further below.

designated prices. The practices described above concerning Stover's pricing and distribution policies have existed for at least five years prior to issuance of the complaint in this matter. Refusals and terminations, as described above, have occurred during this period.

Counsel for both sides also stipulated that a survey was conducted in order to determine the degree of compliance with Stover's pricing policies by its dealers. Because of the agreement to submit the case to the ALJ as a stipulated record, no witnesses were called to describe the procedures or results of this survey. However, based on the parties stipulations about the testimony that would have been offered concerning this survey, including that it was conducted in [4] accordance with accepted and reliable methods, (see IDF 23), we find that approximately 94.4% of Stover products at the retail level were priced at or above the designated prices. From this finding we infer that there is widespread compliance with Stover's pricing policy.

The parties also stipulated that witnesses would testify that they represent a substantial number of retail locations at which Stover products are sold, that they desire regularly or occasionally to sell Stover products at less than designated prices, and that they do not do so because of the company's announced policy that it will not continue to deal with a retailer who sells for less than designated prices. (IDF 24) From this finding, we infer that there are some dealers who comply with Stover's designated prices solely in order to avoid termination and that, in the absence of Stover's threat of termination, these dealers would sell at lower prices.

II. ELEMENTS OF A VIOLATION

Based on the factual record described above, we must determine whether Stover's practices have violated the Sherman Act and, therefore, the Federal Trade Commission Act.[4] Because the complaint alleges that Stover's conduct violates the FTC Act because it violates the Sherman Act, we [5]do not consider whether such conduct violates the FTC Act because it violates the spirit or policy of the antitrust laws,[5] constitutes an incipient violation of the antitrust laws,[6] or otherwise may be an unfair method of competition even though it does not violate the letter or the spirit of the antitrust laws.[7]

In determining whether Stover has violated the Sherman Act and

[4] It is well established that violations of the Sherman Act are, *a fortiori*, a violation of the FTC Act. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972); *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1962).

[5] *See Atlantic Ref. Co.*, 381 U.S. 357 (1965).

[6] *See FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953).

[7] *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972).

the FTC Act as alleged, we turn to the elements of a violation. First, the conduct must be in or affecting commerce, as commerce is defined in the FTC Act. Second, there must be a contract, combination, or conspiracy. Finally, the conduct at issue must be one in "restraint of trade" within the meaning of the Sherman Act. We review each of these elements in turn.

A. *Commerce*

The FTC Act prohibits only practices "in or affecting commerce."[8] There is no controversy concerning this issue since the parties have stipulated that Stover is engaged "in commerce" within the meaning of the FTC Act and its business activities "affect commerce" within the [6]meaning of the Act. (IDF 6) In addition, the challenged distribution and pricing policies affect retail dealers who sell in every state and the District of Columbia. (IDF 5) See also IDF 2, 4 and 5. Based on these stipulations, the ALJ found that the Commission has jurisdiction over respondent and the subject matter of this complaint. (ID 26) We affirm this finding.

B. *Contract, Combination, or Conspiracy*

The central question in this case is whether a "contract, combination, or conspiracy" has been demonstrated by the factual record. On this point the parties differ, and the ALJ, siding with respondent, found an agreement was not present.[9] The ALJ's conclusion was based upon his interpretation of *United States v. Colgate,*[10] and the "Colgate doctrine" that has evolved since that case was decided. The correct interpretation of the *Colgate* doctrine, we agree, is at the heart of the dispute over the existence of an agreement.

Stover argues forcefully that its distribution and pricing policies do not violate the Sherman Act because the are no agreements between Stover and its distributors [7]as to resale prices. For this conclusion, they clearly rely on *Colgate* and argue the following interpretation of the case: "*Colgate* permits a manufacturer to advise retailers that it will refuse to sell to any retailer that violates a policy, and then to refuse to sell to a retailer that does violate an announced policy." (RAB 1) Stover argues that, because it only threatens termination of dealers who do not comply with its pricing policies and terminates those who do not, widespread compliance by

[8] 15 U.S.C. 45(a)(2).

[9] For purposes of our discussion, we use the term "agreement" as synonymous with a "contract," "combination," or "conspiracy." While complaint counsel suggest these three latter terms may have different meanings (CAB 7), we do not deal with that possibility.

[10] 250 U.S. 360 (1919).

Stover dealers with Stover's wishes is unilateral conduct by Stover and by its dealers. Stover argues this conclusion is sound even though there are dealers who comply *solely in order to avoid termination.* (See IDF 24) As Stover's brief states, "[T]he whole point of *Colgate* is that this conduct—announcement of a price-related, refusal to sell policy and refusals to sell pursuant to that policy—is unilateral as a matter of law." (RAB 11)

Complaint counsel, on the other hand, argue that Stover's pricing and distribution policies result in agreements between Stover and its dealers. They, too, recognize that the interpretation of the *Colgate* doctrine is at the core of [8]their dispute with Stover.[11] Complaint counsel offer a number of lines of argument, but essentially rest their case on two propositions. First, they say the *Colgate* doctrine, at least as it stands today, does not prohibit the finding of an agreement in a case where a manufacturer's announced policy of terminating non-complying dealers leads to widespread compliance and some dealers comply solely in order to avoid termination. In such a case, *unwilling* compliance by dealers to avoid termination by a manufacturer, complaint counsel argue, is bilateral conduct and, thus, an agreement for purposes of the Sherman Act. Second, complaint counsel argue that *willing* compliance with a manufacturer's pricing policies by the great majority of dealers, knowing that competitor dealers are being "invited" by the manufacturer to charge the same prices, and knowing that the manufacturer is making continued dealing contingent upon compliance, amounts to a series of vertical agreements between the manufacturer and the dealers.

In order to assess these competing arguments, we turn to the *Colgate* case and subsequent cases interpreting it. [9]

1. *The Colgate Doctrine*

The *Colgate* case was one of the earliest vertical price-fixing cases considered by the Supreme Court. It followed by nine years the first such case reviewed by the Court, *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*[12] In *Dr. Miles,* the manufacturer instituted a distribution program involving jobbers and wholesalers. The contracts between Dr. Miles and these distributors purported to establish a consignment system, requiring each distributor to sell only at prices established by Dr. Miles. When Dr. Miles sued to

[11] It is clear that complaint counsel framed the proof of their case to require a decision dealing squarely with the meaning of the *Colgate* doctrine. In order to achieve this objective, complaint counsel and respondent stipulated to a factual record which included the facts relevant to such a decision. We do not believe such an approach to litigation is inappropriate. The stipulation of facts results in economy in litigation by focusing the real dispute in this matter, which is one of determining the applicability of a legal standard to a narrow and clear set of facts. In addition, it allows for Commission and judicial review which may provide useful clarification in an area of the law which has been the source of much confusion.

[12] 220 U.S. 373 (1911).

enforce this contract against a price-cutting distributor, the Court found the consignment provision to be a sham and the price fixing provision to be a restraint of trade in violation of the Sherman Act.

In *Colgate,* the Court faced allegations of vertical price-fixing as in *Dr. Miles.* However, unlike *Dr. Miles,* there were no express written agreements in *Colgate* which required dealers to charge designated prices. Instead, there were allegations that Colgate had engaged in a number of steps to assure compliance without entering into express contracts with distributors. The Court's consideration of *Colgate* was limited to a review of the district court's dismissal of the government's indictment against the manufacturer. That indictment charged *Colgate* with, *inter alia,* [10]urging its distributors to adhere to suggested prices, requesting information about non-complying dealers, compiling lists of dealers suspended for not complying, and obtaining promises of future compliance from certain dealers.[13] The district court interpreted this indictment as failing to allege a contract or agreement to charge certain prices.[14]

The Supreme Court upheld the district court's quashing of the indictment. It is not entirely clear whether the Court took it upon itself to interpret the indictment, or whether the Court accepted without question the lower court's finding that no agreement was alleged.[15] Complaint counsel argue vigorously that the holding of *Colgate* was limited to a determination that, absent an *allegation* of agreement, a charge of violating Section 1 of the Sherman Act could not stand. (See CAB 29–31) Whatever the precise holding of *Colgate* (and we see no need to make our own determination) it is clear that it is the doctrine that emerged from the case, rather than its holding, that has greatly influenced subsequent antitrust analysis of manufacturer-distributor [11]agreements.[16] Consequently, it is the meaning of this doctrine, as it stands today, with which we are concerned in evaluating Stover's pricing program.

The dilemma faced in *Colgate,* and by the Supreme Court and other courts in subsequent cases, is distinguishing between unilateral and bilateral (or multilateral) conduct where "unilateral" refers to the absence of agreement for purposes of Sherman Act analysis. Applying this distinction to arrangements between suppliers and

[13] 220 U.S. at 303.

[14] 253 F. 522, 527 (E.D. Va. 1918).

[15] "And we must conclude that *as interpreted below,* the indictment does not charge Colgate . . . with selling its products to dealers under agreements which obligate the latter not to resell except at prices fixed by the company." (emphasis added) 220 U.S. at 306–307. *See also, U.S. v. Parke, Davis & Co.,* 362 U.S. 29 (1960). "[T]he District Court's interpretation of the indictment [in *Colgate*] was binding and . . . without an allegation of agreement there was no Sherman Act violation charged." *Id.* at 36–37.

[16] There is little doubt that the facts alleged in the indictment would, based on subsequent decisions, violate the Sherman Act. See pages 49–54, *infra.*

distributors is particularly troublesome since the very nature of the supplier-distributor relationship calls for some long-term "agreed to" conduct on both sides. Moreover, in conveying suggested prices to distributors, conduct which is not prohibited by the Sherman Act, sellers are conveying their preferences to distributors as to resale prices. Determining when the suggested prices are followed pursuant to an "agreement" between buyer and seller, rather than because of unilateral behavior which is merely consistent with the seller's preferences, raises subtle and difficult questions.

The *Colgate* case attempted to reconcile the prohibition on agreements between manufacturers and distributors to fix prices with the freedom of a manufacturer to sell to whom it chooses. Although the practices actually alleged to have been followed by *Colgate* would have violated subsequent interpretations of the *Colgate* doctrine, the Court addressed the right of a seller to choose its buyers in the now well-known passage: [12]

> In the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. *And, of course, he may announce in advance the circumstances under which he will sell.* (emphasis added)[17]

The second, underscored sentence of this passage has created difficult problems of interpretation, because it suggests that a manufacturer may announce that he will deal only with those who will comply with his pricing policies. Later cases, in addition to restating this passage from *Colgate,* make clear *Colgate* was intended to apply to the manufacturer's freedom to stop dealing with distributors who begin to discount.[18] Thus, under the initial formulation of the *Colgate* doctrine, it appeared that a manufacturer could announce a pricing policy and threaten to terminate those who did not comply with it, even though the threats in themselves were the cause of adherence, rather than a result of voluntary, unilateral behavior on the part of the distributor. Thus, while unwilling compliance under the threat of termination appears to be the antithesis of unilateral behavior, this language suggests that the Court's early approach to identifying agreements accepted the anomalous result of placing coerced compliance outside the proscription of the Sherman Act.

Early Supreme Court decisions after *Colgate* made clear that the Sherman Act prohibition of vertical price-fixing arrangements was not limited to agreements embodied in [13]express contracts between

[17] 250 U.S. at 307.

[18] *See, e.g., FTC v. Beech-Nut Packing Co.,* 257 U.S. 441, 452–53 (1922).

manufacturers and distributors. In *Frey & Son v. Cudahy Packing Co.*,[19] the government alleged that a manufacturer had engaged in vertical price-fixing in the absence of express agreements. The Court of Appeals reversed the district court's judgment against the defendant on the ground that there was no express agreement to fix prices. The Supreme Court reversed, emphasizing that no express contract to fix prices was required to violate the Act but that the "essential agreement, combination, or conspiracy might be implied from a course of dealing or other circumstances."[20]

The seemingly straightforward proposition that agreements may be implied from a course of dealing provides a useful basis for distinguishing unilateral from bilateral behavior in many situations. This type of analysis is frequently employed, of course, in contract law. However, later vertical price-fixing cases illustrate the application of the Sherman Act to conduct engaged in by the manufacturer which had the effect of "pressuring" the dealer into compliance and some of the difficulties in determining when an implied agreement was present in such circumstances.

For example, in *FTC v. Beech-Nut Packing Co.*,[21] the Court considered a distribution program whereby the manufacturer distributed both wholesale and retail suggested price lists, announced that it would refuse to continue to [14]sell to any distributor who failed to charge these prices, refused to sell to wholesalers who sold to retailers who did not comply with suggested prices, and engaged in active price surveillance of its distributors. In addition, if a non-complying distributor was terminated, it would be reinstituted by promising future compliance. The Court found that, despite the absence of express contracts, Beech-Nut's methods were effective in achieving the desired result. The Court concluded that these practices, pursued vigorously by Beech-Nut to insure that its pricing program was implemented, went "far beyond the simple refusal to sell goods to persons who will not sell at stated prices, which in the *Colgate* case, was held to be within the legal right of the producer."[22]

While the *Beech-Nut* fact situation included reinstatement of terminated distributors based on assurances of compliance, conduct which is surely bilateral, the Court also seemed to find agreements on the basis of the involvement of wholesalers in the scheme, who also were subject only to termination for failure to comply, and on the basis of the use of an active price monitoring system. While these practices by Beech-Nut surely increased the likelihood of compliance

[19] 256 U.S. 208 (1921).
[20] *Id.* at 210.
[21] 257 U.S. 441 (1922).
[22] 257 U.S. at 454.

by dealers, the logic of finding "agreements," in light of the original *Colgate* pronouncement concerning the right to threaten termination, is not apparent. In later comments about *Beech-Nut,* the Court indicated that the case went beyond [15]earlier cases by making clear that an agreement did not have to rise to the level of an express or implied contract[23] but that a combination would be found if the seller secured adherence to his pricing policy by any means which go beyond a "mere declination to sell."[24]

Cases after *Beech-Nut* allowed for the finding of an agreement based upon manufacturers' "pressuring" or other activities which increased the likelihood that dealers would comply with the manufacturer's pricing policies. In *U.S. v. Bausch & Lomb,*[25] the manufacturer established a two-tier distribution program in which wholesalers were not to sell to retailers who did not charge suggested prices. Eligible retailers were required to have obtained "licenses" from Bausch & Lomb, and one of the requirements for doing so was agreeing to charge certain prices.[26] This agreement [16]with retailers would surely be analyzed as bilateral. However, the Court also indicated that the wholesalers' participation in the plan violated the Sherman Act and that such a combination between Bausch & Lomb and its wholesalers could be found on the basis of acquiescence of the wholesalers:

> Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial.[27]

It is difficult to reconcile the Court's view that participation of wholesalers, even by acquiescence, allows for the finding of an agreement with the early statement of the *Colgate* doctrine. Under the *Bausch & Lomb* view of an agreement, neither the wholesaler nor the retailer needed to have given any express or implied assurances that they would comply with the manufacturer's preferences. Thus, the agreement in *Bausch & Lomb* appears to turn only upon the fact that wholesalers added something "extra" to Bausch & Lomb's efforts to obtain compliance from its retailers. That is, even

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[23] *See U.S. v. Parke, Davis & Co.*, 362 U.S. 29, 43–44. "In the cases decided before *Beech-Nut* the Court's inquiry was directed to whether the manufacturer had entered into illicit contracts express or implied. . . . The [*U.S. v. Bausch & Lomb,* 321 U.S. 707 (1944)] and *Beech-Nut* decisions cannot be read as merely limited to particular fact complexes justifying the inference of an agreement in violation of the Sherman Act. Both cases teach that judicial inquiry is not to stop with a search of the record for evidence of purely contractual arrangements."

[24] 362 U.S. at 43. The *Beech-Nut* case was decided on the basis of Section 5 of the FTC Act, rather than the Sherman Act. The Court's opinion indicates that it viewed the manufacturer's practices as violating the Sherman Act as well. 257 U.S. at 454. Thus, we do not believe the Court's review of the case under the FTC Act, as opposed to the Sherman Act, was significant to its decision.

[25] 321 U.S. 707 (1943).

[26] *Id.* at 719.

[27] *Id.* at 723.

though neither wholesalers nor retailers necessarily provided explicit or implicit assurances of compliance, and the manufacturer's only recourse was to decline further dealings, the extra factor of involving wholesalers in the scheme in obtaining retailer compliance went beyond the manufacturer's mere threat of terminating future dealing.[28] [17]

In 1960, the Court decided *U.S. v. Parke, Davis & Co.*[29] Parke, Davis, the manufacturer, had implemented a distribution and pricing policy in which it 1) announced a policy of refusing to deal with retailers who did not comply with suggested prices; 2) terminated dealers who did not comply; 3) announced a policy of refusing to sell to wholesalers who sold to non-complying retailers; 4) induced retailers to comply with suggested prices by telling each retailer that others would go along if it did; and 5) reinstated non-complying dealers after assurances that they would comply in the future. The district court found no liability on the ground that these practices were unilateral and, thus, no agreement was present.

The Court in *Parke, Davis,* in finding liability, reiterated that there was no requirement for a Sherman Act violation to find an express or implied agreement.[30] In addressing the district court's finding that there was no agreement between Parke, Davis and its distributors, the Court pointed, as in *Bausch & Lomb,* to the involvement of [18]wholesalers in the program.[31] It is clear from the opinion that involvement of wholesalers alone, aside from whether the wholesalers participated only in order to avoid termination or had given assurances to the manufacturer, was enough to go beyond the "limited dispensation" of *Colgate.*[32] The Court went on, however, to restate the *Colgate* pronouncement that a manufacturer could achieve adherence to a pricing policy by threatening termination.[33]

Parke, Davis appeared to mean that engaging in any conduct, even that which is not logically related to finding an agreement and which in itself is consistent with a right to threaten termination, but which goes beyond a refusal to continue dealing on the grounds of non-compliance, is enough to allow a finding of agreement:

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[28] Alternatively, *Bausch & Lomb* could be interpreted to mean that wholesalers who acquiesce in the scheme in order to avoid termination by the manufacturer give rise to a combination between the manufacturer and the wholesalers, a result which would be inconsistent with the Court's early pronouncement of the *Colgate* doctrine. However, the Court cited *Colgate* with approval. 321 U.S. at 722.

[29] 362 U.S. 29 (1960).

[30] 362 U.S. at 43.

[31] "In thus involving the wholesalers to stop the flow of Parke, Davis products to the retailers, thereby inducing retailers' adherence to its suggested prices, Parke, Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act." 362 U.S. at 45.

[32] *Id.* at 46. The Court indicated that Parke, Davis had also given rise to an agreement by securing assurances of compliance from at least one distributor, conduct which can be readily identified as bilateral. *Id.* at 46. However, this was an *additional* ground for finding a combination.

[33] *Id.* at 44.

. . . an unlawful combination is not just such as arises from a price maintenance *agreement* express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy.[34] [19]

However, as Justice Harlan stated in his dissent, "I cannot see how such unilateral action [refusal to sell to wholesalers] permissible in itself, becomes any less unilateral because it is taken simultaneously with similar unilateral action at the retail level."[35] The *Parke, Davis* opinion has been the subject of much scholarly comment and criticism.[36] While *Parke, Davis* did not expressly overrule the *Colgate* doctrine, it left it in problematic form. There is an inherent conflict between recognizing a combination among manufacturers, wholesalers, and retailers (because both wholesalers and retailers could be terminated for refusing to comply) yet refusing to recognize a combination when retailers alone comply in order to avoid termination.

Dean Levi commented about the development of *Colgate* through *Parke, Davis*:

. . . it is a matter of concern that the law should have failed to provide itself with a meaningful structure of theory. Beyond this, it is a matter of [20]concern also that in an area involving important commercial practice the law should have developed so as to appear to put a premium on the avoidance of words which describe what the parties clearly intend. This must seem strange and degrading to men who take pride in their given word, and it fosters a caricatured view of the law.[37]

We believe the cases subsequent to *Parke, Davis* indicate a shift in the Court's reasoning in order to deal with the form in which the *Colgate* doctrine was preserved in the *Parke, Davis* opinion.

In *Simpson v. Union Oil Co.*,[38] the Court found that a manufacturer had fixed retail prices by entering into agreements with its distributors which were found to be sham consignment arrangements. While the case dealt with express agreements between the manufacturer and the distributors, the Court emphasized the presence of coercion would result in a violation of the Sherman Act:

We made clear in [*Parke, Davis*] that a supplier may not use coercion on its retail

[34] *Id.* at 43.

[35] *Id.* at 55. Justice Harlan expressed his view in dissent that the initial statement of the *Colgate* doctrine had been overruled by the majority opinion. *Id.* See, however, his dissent in *Albrecht v. Herald*, 390 U.S. at 163, fn. 7, in which he said his conclusion "was overdrawn."

[36] *See, e.g.*, Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962) (hereafter, "Turner"); Fulda, *Individual Refusals to Deal: When Does Single Firm Conduct Become Vertical Restraint?* 30 Law & Contemp. Prob. 590 (1965); Patvin, *Choosing and Dropping Distributors*, 26 A.B.A. Antitrust Section 99 (1964); Levi, *The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance*, The Supreme Court Review (1960) (hereafter, "Levi").

[37] Levi, *supra*, at 326.

[38] 377 U.S. 13 (1964).

outlets to achieve resale price maintenance. We reiterate that view, adding that it matters not what the coercive device is.[39]

It is true that there were express contracts between the manufacturer and the dealers in *Simpson* and that the contracts required the dealers to follow fixed prices. [21]The sanction imposed by the supplier in *Simpson,* however, was termination of future dealing by cancelling the dealer's lease. The basis for the violation found by the Court appeared to be the coercion resulting from a threat of lease cancellation, not any contractual duty by the dealer to charge a fixed price.

Finally, *Albrecht v. Herald Co.*[40] appears to signify a culmination of the Court's trend toward recognizing coercion from threatened termination and resulting unwilling compliance as sufficient for a finding of agreement for purposes of the Sherman Act. In *Albrecht,* a distributor failed to comply with the seller's designated resale price. In order to induce the distributor to comply, the seller hired an agent to solicit the distributor's customers and a second distributor to sell part of the product that had been supplied to the non-complying retailer. Eventually, the non-complying retailer was terminated. The Court found a violation of the Sherman Act. There clearly were two combinations to which the Court pointed, between the seller and the soliciting agent and between the seller and the second distributor. In addition to these combinations, however, the Court referred to two other theories of agreement. [22]

Under *Parke, Davis,* petitioner could have claimed a combination between respondent and himself, at least as of the day he unwillingly complied with respondent's advertised price. Likewise, he might successfully have claimed that respondent had combined with other carriers because the firmly enforced price policy applied to all carriers, most of whom acquiesced in it.[41]

It is possible to limit the significance of *Albrecht* to the narrow facts of a combination between the seller and the replacement distributors. Nevertheless, the Court's statement about a combination between the manufacturer and the carrier, which would come into existence upon unwilling compliance by the carrier, convinces us, particularly in light of statements by the Court in other cases discussed below, that the Court wished to clarify that there was no right to secure unwilling compliance through the threat of termination.

Moreover, the Court also referred to its *Parke, Davis* opinion

[39] *Id.* at 17.
[40] 390 U.S. 145 (1968).
[41] *Id.* at 150, n.6.

apparently in an effort to make clear that compliance resulting from a threat of termination resulted in a finding of an agreement:

> Parke, Davis had specified resale prices for both wholesalers and retailers and had required wholesalers to refuse to deal with non-complying retailers. It was found to have created a combination "with the retailers and the wholesalers to maintain retail prices . . ." (citation omitted) The combination with retailers arose *because their acquiescence in the suggested prices was secured by threats of termination;* the combination with wholesalers [23]arose because they cooperated in terminating price-cutting retailers. (emphasis added).[42]

The ALJ concluded that the Court's statements in *Albrecht* were premised on the fact that the franchisee was especially vulnerable to the danger of termination. (ID 18) While it is conceivable that the Court's holding turns on this qualification, there is no discussion of it in the opinion sufficient to indicate this factor was determinative. Consequently, we do not read *Albrecht* to say that threatened termination is only adequate to allow a finding of agreement when combined with substantial economic leverage.[43]

Two other Supreme Court cases, *U.S. v. Arnold, Schwinn & Co.,*[44] and *Perma Life Mufflers v. International Parts,*[45] aid in interpreting the Court's statements in *Albrecht.* [24]

In *Schwinn,* the Court considered allegations of combinations between the manufacturer and its dealers which restricted the dealer's sales practices. The district court had rejected a finding that dealers had been terminated for failing to comply with Schwinn's restrictions. The Court found there was no need to find actual termination because Schwinn had been "'firm and resolute' in insisting upon observance of territorial and customer limitations . . . and Schwinn's 'firmness' in these respects was grounded upon the communicated danger of termination."[46] It is not clear whether the Court was relying on a "communicated danger of termination" to find a combination or only to indicate this was sufficient to show that the agreements were actually enforced.[47] However, in *Perma Life,* the Court appeared to use this language as justifying a finding of combination between a seller and its distributors.

In *Perma Life,* the plaintiffs were distributors who had entered

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[42] *Id.* at 149.

[43] Moreover, as we discuss futher below, focusing on the degree of economic leverage in assessing whether an agreement is present would again introduce a factor that is not logically related to distinguishing bilateral and unilateral conduct. If a dealer is said to have "agreed" to comply with a manufacturer's designated prices in order to avoid termination of his franchise, it seems hardly logical to conclude there is no agreement if he complies to avoid termination of only some portion of the supplies he resells.

[44] 388 U.S. 365 (1967).

[45] 392 U.S. 134 (1968).

[46] 388 U.S. at 372.

[47] There is some evidence that Schwinn obtained actual contractual agreements with its distributors and retailers. 237 F. Supp. 323, 340–342 (N.D. Ill. 1965).

into sales agreements with the defendants. The principal issue before the Court was determining whether the plaintiffs were barred from suing defendants because they were *in para delicto.* The Court held the plaintiffs were not barred. As in *Albrecht,* the Court indicated there were alternative theories for charging a combination: [25]

> [P]etitioner can clearly charge a combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements, [citing *Albrecht* and *Simpson*], or between Midas and other franchise dealers, whose acquiescence in Midas' firmly enforced restrictions was induced by "the communicated danger of termination." [citing *Schwinn* and *Parke, Davis*][48]

As respondent points out (RAB 26, 28–29) the *Perma Life* supplier-distributor agreements were express. Thus, the Court's statements that the combinations were formed by the "communicated danger of termination" are technically dictum. Nevertheless, these statements in both cases, it seems clear, were meant to make a separate point—that acquiescence induced by a communicated danger of termination gives rise to a combination.[49] Thus, after *Albrecht* and *Perma Life,* the Court appears to have interpreted *Colgate* to allow a finding of agreement when compliance with the manufacturer's wishes is coerced through threatened termination.

We do not believe that the statements in *Albrecht* and *Schwinn* regarding combinations arising because of the "communicated danger of termination" turned, as the ALJ believed (ID 18), on the franchise relationship. First, [26]nowhere in *Albrecht* or *Schwinn* did the Court state that this theory of combination turned upon the franchise relationship or the presence of economic leverage generally. Second, distinguishing between agreements arising because of the degree of economic leverage inherent in the franchise situation and compliance resulting from a threat of termination of the supply of products for resale is unsound in theory. In both situations, the manufacturer is able to induce the dealer to act contrary to his own pricing preferences in order to avoid economic loss. For example, a supplier who has the right to cancel a distributor's lease may not have extracted an express assurance of compliance with his pricing policy. Similarly, a supplier who may decide to cease supplying a dealer, may not have extracted a promise of compliance. In both cases, there is no contractual obligation for the supplier to continue

[48] 392 U.S. at 142.

[49] *See also, Response of Carolina, Inc. v. Leasco Response, Inc.,* 537 F.2d 1307, 1315 (5th Cir. 1976). "Reliance on *Schwinn* makes it clear that the firm and resolute language in that opinion was meant to show the existence of an agreement."; *Yentsch v. Texaco,* 1980–2 Trade Cas. ¶63,349 at 75,785 (2d Cir. 1980). Professors Pitofsky and Dam disagree over the meaning of this language in *Schwinn.* Pitofsky and Dam, *Is the Colgate Doctrine Dead?* 37 Antitr. L.J. 772, 776–777, 785 (1968) (hereafter "Pitofsky and Dam").

to deal or for the dealer to charge certain prices. However, in both cases, the supplier can make continued dealing contingent upon the dealer's performance of some condition. Unwilling compliance with the supplier's pricing policies to avoid termination necessarily implies at least some economic leverge over the dealer, just as does unwilling compliance in order to avoid lease cancellation. The successful use of such leverage is the essence of coercion.

Lower court cases after *Albrecht* and *Perma Life* have rarely dealt with factual circumstances closely analogous to those presented here. For example, several cases cited by respondent (see RAB 32) do not deal with threatened termination [27]for failure to abide by suggested prices.[50] Another involved conduct by the manufacturer which clearly exceeds such threatened termination.[51] While these cases cite *Colgate* they are not particularly helpful in articulating the precise meaning of the *Colgate* doctrine, at least for purposes of analyzing Stover's policies. Some cases, however, do present a closer factual picture and one which is more helpful in illustrating the lower court's views concerning the *Colgate* doctrine.

In *Broussard v. Socony Mobil Oil Co.*,[52] the court of appeals reviewed a claim by a distributor plaintiff whose lease had been cancelled by the defendant manufacturer when plaintiff refused to abide by the defendant's pricing policies. The court found that the defendant's failure to renew the lease was not a unilateral refusal to deal protected by *Colgate* because the defendant exercised the power, not only to terminate the supply of product to the distributor, but also to terminate the plaintiff's "entire service station operation." A combination was created between the [28]manufacturer and the distributor during the period of his compliance.[53]

Quinn v. Mobil Oil Company[54] was similar to *Broussard* in that the plaintiff's lease was cancelled after he failed to comply with the supplier's pricing policies. The court of appeals found no agreement was formed on two grounds. First, the plaintiff never complied with the defendant's pricing policy.[55] Second, there was no allegation that the defendant's pricing policy was "part of a general price mainte-

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[50] *See e.g., Alladin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107 (5th Cir. 1979); *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir. 1978) *(en banc), cert. denied*, 439 U.S. 946 (1978); *Amplex of Maryland, Inc. v. Outboard Marine Corp.*, 380 F.2d 112 (4th Cir. 1967), *cert. denied*, 389 U.S. 1036 (1968).

[51] *Adolph Coors Co. v. F.T.C.*, 497 F.2d 1178 (10th Cir. 1974).

[52] 350 F.2d 346 (5th Cir. 1965).

[53] *Id.* at 350.

[54] 375 F.2d 273 (1st Cir. 1967), *cert. denied*, 389 U.S. 801 (1967).

[55] *Id.* at 276.

nance scheme or policy or that any other dealer reduced his retail price as a result of defenant's insistence . . . "[56] In *Butera v. Sun Oil Co., Inc.*,[57] the distributor sued his supplier alleging a resale price maintenance scheme. The court found no liability on the grounds that the supplier had not threatened any action [29]contingent upon the dealer's compliance with suggested prices:

. . . a case of illegal price maintenance is made out when a price is announced and some course of action is undertaken or threatened contingent on the willingness or unwillingness of the retailer to adopt the price. The action need not necessarily fit under the rubric "coercion," but it must involve making a meaningful event depend upon compliance or non-compliance with the "suggested" or stated price.[58]

In *Gray v. Shell Oil Co.*,[59] the Ninth Circuit Court of Appeals drew a distinction between "coercion" and "exposition, persuasion and argument" in stating the permissible limits of the *Colgate* doctrine. The Ninth Circuit commented on this standard in reviewing a claim of resale price maintenance in *Hanson v. Shell Oil Co.*,[60] in 1976. *Hanson* dealt with allegations of resale price-fixing by a distributor. The court did not find that the distributor had been coerced sufficiently to deprive him of his free choice. However the court stated that:

If the agreement between the supplier and his buyer is reached because of coercive conduct toward non-complying buyers, *such as refusals to deal,* a violation is . . . made out. [Citing *Simpson,* supra.] (emphasis added) [30]

A significant case in assessing the meaning of *Colgate,* and one upon which complaint counsel rely heavily, is *Yentsch v. Texaco, Inc.*[61] In *Yentsch* a terminated distributor alleged vertical price-fixing by the manufacturer. The plaintiff claimed that Texaco had threatened him with termination and, after he had continued to fail to comply with Texaco's pricing policy, terminated his lease. In finding that Texaco had gone beyond *Colgate* protection, the court found:

there was sufficient evidence here, although just barely, to find an illegal combination to maintain resale prices between Texaco and . . . other dealers, and between Texaco and [the plaintiff]. Texaco went beyond *Colgate's* safe harbor of announcement plus mere refusal to deal by creating a coercive business climate in which dealers knew of

[56] *Id.*

[57] 496 F.2d 434 (1st Cir. 1974).

[58] *Id.* at 437. The court's reasoning is consistent with the proposition that a threat of termination contingent upon non-compliance would be sufficient for a finding of agreement. However, in a footnote, the court indicated its understanding of *Colgate* to be that making continued dealing contingent upon compliance was protected. *Id.* at 437, fn. 7.

[59] 469 F. 2d 742, 748 (9th Cir. 1972).

[60] 541 F.2d 1354 (9th Cir. 1976).

[61] 1980–2 Trade Cas. ¶ 63,349 (2d Cir. 1980).

the low price policy, understood the consequences of failure to comply and thus generally complied.[62]

At several points the court stated that threats of termination were sufficient to go beyond a mere refusal to deal.

Texaco's threats of termination to enforce its price policy were sufficient to satisfy the *Parke, Davis - Albrecht* standards of "means beyond mere refusal to deal" and "firm enforcement."[63] **[31]**

While evidence of exposition, persuasion, argument or pressure alone is insufficient to establish coercion [citations omitted], threats of termination, as long as they secure adherence to the fixed price, have been deemed to trespass beyond the boundaries of *Colgate,* thereby triggering a finding of an illegal combination. [citing *Albrecht.*][64]

Respondent argues (RAB 32–33) that *Yentsch* should not be read to mean that compliance resulting from the threat of termination is sufficient to constitute an agreement. Respondent distinguishes *Yentsch* on the grounds that the defendant supplier had repeatedly warned the defendant that he would be terminated unless he followed the supplier's pricing policies. The ALJ, siding with respondent in his interpretation of *Yentsch,* distinguished the case on the basis of the existence of a short-term lease with the supplier, the threats of lease-cancellation and price surveillance. (ID 17, n.16) However, the court's finding of an agreement does not appear to require the presence of price-monitoring.[65] In addition, as we discuss further below, we do not believe there is a significant distinction between a threat to cancel a lease and a threat to terminate dealing.

Respondent relies heavily upon *Klein v. American Luggage Works, Inc.*[66] In *Klein,* the defendant manufacturer suggested resale prices to retailers. Salesmen were **[32]**instructed to advise new accounts that full compliance with suggested prices was mandatory. There was some evidence of price-monitoring by the manufacturer. Representatives of the manufacturer visited plaintiff Klein's store and discovered he was discounting. Klein was given notice of termination. At a subsequent meeting, Klein was informed that resumption of his account was conditional upon compliance with suggested prices, but he refused.

The district court found that the defendant had formed combinations with competitors of Klein on the basis of conduct which exceeded an announced policy of termination, including frequently

[62] *Id.* at 75,784.

[63] *Id.*

[64] *Id.* at 75,784–85. The court cited, as support, *Albrecht* and *Bowen v. New York News, Inc.*, 522 F.2d 1242, 1254 (2d Cir. 1975).

[65] "The coercive atmosphere *may* have been enhanced by a policy of price surveillance." (emphasis added) *Id.*

[66] 323 F.2d 787 (3d Cir. 1963).

sending price literature to the dealers and using solicitation practices that were "tantamount to an implied promise to comply with ticketed prices."[67] In particular, the court found that "[i]n the face of an advance announcement by the manufacturer that price cutters will be denied supply, a seller's compliance with prices suggested strongly infers a tacit or implied resale price maintenance agreement."[68] The court found the arrangement to be indistinguishable from a horizontal price-fixing conspiracy among the dealers.[69] The court of appeals found no horizontal conspiracy and held, based on *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*,[70] that there was at most conscious parallelism of action between the department [33]stores.[71] The court of appeals rejected the proposition that "retailers who adhere to suggested retail prices, knowing that compliance by competitors is expected by the manufacturer in consonance with his price maintenance policy, thereby, without more, become co-conspirators with the manufacturer."[72]

We read this case to hold that willing compliance with a pricing program by multiple distributors who know compliance is expected by the manufacturer as a condition of continued dealing, does not, without more, create a vertical-horizontal combination involving the supplier and the dealers. We discuss this theory of a vertical-horizontal combination below and whether it is applicable to the factual record presented here. However, the *Klein* court did not deal specifically with the question of whether unwilling compliance resulting from fear of termination constitutes an agreement. Nevertheless, even if the *Klein* court would not have found a vertical agreement based upon unwilling compliance and threatened termination, we note this case was decided before *Albrecht* and *Perma Life.*

In addition to *Quinn* and *Klein,* discussed above, the ALJ relied upon *Dart Drug Corp. v. Parke, Davis*[73] in finding no agreement was present in this case. In *Dart Drug* [34]the plaintiff attempted to rely upon a prior government judgment to support a vertical price-fixing action against *Parke, Davis.* The court found that Dart has relied upon facts proved in the government's case to support its claim of a conspiracy occurring in a later time period and, therefore, the

[67] 206 F. Supp. 924 (D. Del. 1962).
[68] *Id.* at 937.
[69] *Id.* at 937–8.
[70] 346 U.S. 537 (1954).
[71] 323 F.2d at 791.
[72] *Id.*
[73] 344 F.2d 173 (D.C. Cir. 1963).

plaintiff had failed to present evidence of an agreement in the relevant time period.[74] While the plaintiff had demonstrated it had been terminated by the defendant, it had not shown whether the motivation was for discounting or for presenting testimony against it in the government case.[75] The court specifically did not address the limits of the *Colgate* doctrine,[76] nor did it decide whether or not coerced compliance as a result of threatened termination constitutes an agreement. Moreover, this case, like *Klein,* was decided before *Albrecht* and *Perma Life.*

2. *Agreement Based Upon Threatened Termination*

Our review of Supreme Court and lower court cases convinces us that, despite the Court's original pronouncement concerning the right of a manufacturer to threaten termination for failing to comply with pricing policies, that right has been circumscribed by a prohibition on the securing of unwilling compliance through the coercion [35]inherent in threatened termination. We recognize that our interpretation is not free from doubt. Despite the strong language in a number of opinions, e.g., *Albrecht, Schwinn, Hanson* and *Yentsch,* that coercion from threatened termination which leads to unwilling compliance is sufficient for finding an agreement, there are other factors which could be relied upon as distinguishing it from the case presented here. For example, in *Albrecht,* the supplier hired a substitute distributor. In *Schwinn* the manufacturer could be said to have exercised substantial economic leverage over the distributors. In *Yentsch,* the manufacturer apparently threatened termination a number of times rather than just once and, as in *Hanson,* the supplier had the right to terminate the dealer's lease.

However, we do not believe that these cases should be read to compel the conclusion that they should be limited to their precise facts. Such an interpretation, we believe, elevates form over substance by focusing on factors which are actually tangential to the real ongoing relationship between suppliers and distributors. No doubt, there has been a tendency for some "extra" factor, beyond threatened termination, though not necessarily significant in itself, to be present in the evidentiary record when courts have analyzed a claim that a dealer has been coerced into compliance with the manufacturer's pricing policies. The presence of this "extra" factor seems to have provided at least an arguable rationale, though doing some theoretical damage in the process, for maintaining the Court's

[74] "What must be proved is that the act occurred in a contemporaneous framework of the combination, conspiracy, or agreement forbidden by the statute. And that proof may not be supplied by a judgment which establishes no more than that such a framework did exist at an earlier point in time." 344 F.2d at 186.

[75] *Id.*

[76] *Id.*

original [36]statement of the *Colgate* doctrine. *Parke, Davis,* in fact, appeared to sanction this very type of analysis. However, the logic of the Court's statements in *Albrecht, Perma Life,* and other post-*Parke, Davis* opinions convinces us that the *Parke, Davis* "plus factor" requirement for an agreement to be found was not intended to be essential where unwilling compliance resulting from threatened termination is present.[77] While it is true that there is no Supreme Court holding to this effect, we must interpret *Colgate* in light of a history of an evolving standard and a series of clarifying cases. In effect, the "plus factor" requirement has evolved to serve as a device for the courts to infer the presence of coercion, a concept that the Court has utilized to connote bilateral behavior.[78] Here, coercion is clearly present and provides direct evidence that bilateral behavior, and hence agreements, [37]existed. Consequently, we belive that, were the Court faced with the factual record presented here, an agreement would be found.

We conclude, therefore, that there is no sound legal distinction between coercion resulting from the threat of cancelling a lease or terminating a franchise and coercion resulting from a communicated policy of terminating supply of products for resale to dealers who fail to comply with the manufacturer's pricing policies. In both sets of situations the distributor is induced to act contrary to its preferences in order to avoid termination or other sanctions. It is important to note that we are not dealing here with mere parallel behavior, that is, where dealers decide independently to charge the same prices suggested by manufacturers. Rather, we are faced with an unambiguous factual record establishing that a number of dealers comply with Stover's pricing policy in order to avoid termination. (IDF 24) Absent the threat of termination, they would charge lower prices. This conduct—a threatened action of refusal to continue dealing, followed by unwilling compliance in order to avoid the threatened sanction, followed by continued dealing—is the antithesis of unilateral behavior.[79]

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[77] In 1968, this Commission issued an advisory opinion stating the Commission's view that a "seller not acting to create or maintain a monopoly may make a unilateral announcement of his policy as to those with whom he will deal, including policies affecting price, and he may refuse to deal with those who do not observe that policy." 16 C.F.R. 15.163 (1968). That opinion, which disapproved a proposal by a supplier to refuse dealing with retailers who used the term "sale" or similar words in advertisements, preceded *Albrecht* and *Perma Life.* Thus, to the extent that advisory opinion differs from our conclusions, we decline to follow it.

[78] Coercion, as used here and in prior court cases, means that dealers are constrained in a practical commercial sense. Consequently, we disagree that coercion can only exist if no other suppliers stand ready to sell comparable products to the distributor as Chairman Miller's dissent proposes. Using "coercion" in that sense would describe only a handful of real-life situations and would represent a marked departure from prior cases.

[79] "The short of the matter is that a distinction between a program of resale price maintenance effected by contracts and 'agreements,' and one effected by threats of refusal to deal, is wholly untenable as a practical *or* logical matter unless 'agreement' is defined to exclude tacit or implied agreements." Turner, *supra,* at 686–687.

3. *Agreement Based Upon Invitation and Acceptance*

Complaint counsel present a second theory of vertical agreement between Stover and its dealers based upon Stover's [38]invitation to its dealers to participate in a plan and the dealers' acquiescence. (CAB 9–14) The complaint in this matter did not allege a horizontal combination among the dealers as the ALJ recognized. (ID 13) Complaint counsel argue, however, based on *Interstate Circuit, Inc. v. U.S.*[80] that the record shows vertical agreements have been created because the manufacturer has invited a series of distributors to participate in a scheme to charge particular prices and each distributor has expressed his assent and participated in the scheme. Complaint counsel urge us to adopt this theory of agreement by adherence to the manufacturer's pricing program, motivated by the prospect of uniformly higher prices and lack of price competition among their competitor distributors, in addition to a theory of agreement based on unwilling compliance by distributors wishing to avoid termination. The ALJ rejected this theory on the ground that:

> no court has yet invoked the rationale of "invitation and acceptance" to hold that a declaration of pricing policy initiated by the manufacturer represents an invitation to dealers to participate in either a vertical or horizontal price-fixing agreement forbidden by the Sherman Act. (ID 13)

For reasons we discuss below, we also decline to adopt this theory as a basis for liability.

Interstate Circuit involved a movie theatre chain's inducement of its distributors to enter into identical contracts regarding pricing and exhibition of films. In particular, the chain sent letters to the distributors, disclosing the names of the other addressees, demanding that [39]the distributors refuse to supply first run films to theatres which did not charge specified prices or which showed their films as part of a double feature. The Court found a conspiracy among the distributors and between the distributors and the theatre chain. The Court pointed to the fact that "[e]ach distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan."[81] Under these circumstances:

> Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of trade, is sufficient to establish an unlawful conspiracy under the Sherman Act.[82]

[80] 306 U.S. 208 (1939).
[81] *Id.* at 226.
[82] *Id.* at 227.

Subsequently, the Court applied a similar analysis in *U.S. v. Masonite Corp.*[83] In *Masonite* a manufacturer fixed resale prices by entering into a series of vertical agreements with its distributors. The Court in finding a vertical-horizontal combination including the manufacturer and the dealers, repeated the statement made in *Interstate Circuit,* "[I]t was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it."[84]

In effect, complaint counsel argue that the *Interstate Circuit* analysis is applicable here because Stover dealers acquiesce in the designated prices only because they are [40]highly confident their competitor dealers will as well.[85] This confidence is engendered by the general knowledge that non-compliance results in termination.

Professor Turner, in a 1962 article, endorsed applying the *Interstate Circuit* analysis to a manufacturer's invitation to dealers to acquiesce in his pricing policies.

> To apply *Interstate Circuit* language, a manufacturer's stated policy of dealing only with distributors who sell at not less than a stipulated price is inevitably, in his approach to each and all distributors, "an invitation to participate in a plan, the necessary consequence of which [in light of *Dr. Miles*] is restraint of interstate commerce." Moreover, each distributor knows "that concerted action is contemplated and invited"; each gives his adherence to and participates in it. A fortiori such a program falls within the minimal elements held to be a vertical-horizontal conspiracy in *Masonite.*[86]

Professor Turner cautioned, however, that this approach might lead to unsatisfactory results in analyzing other types of manufacturer-dealer agreements, e.g., territorial restrictions.[87]

It is no doubt true that conditioning future dealing upon compliance is a significant factor in inducing many dealers to adhere to the manufacturer's pricing policies. [41]First, it may have the coercive effect of obtaining compliance by threatening termination. Second, it may make the manufacturer's pricing policies more attractive because it engenders confidence that other dealers will follow these policies as well. Some dealers may prefer that the manufacturer implement such a policy so that the possibility of price competition is

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[83] 316 U.S. 265 (1942).

[84] *Id.* at 274–275.

[85] Complaint counsel make clear that they rely on *Interstate Circuit* only for "its reliance on circumstantial factors from which it inferred a vertical agreement." (CAB 11) However, the vertical agreements in both *Interstate Circuit* and *Masonite* were express. We understand complaint counsel's analysis, therefore, to turn on the economic incentives to dealers to pursue uniform pricing policies stemming from the manufacturer's solicitation of such common action. (See CAB at 10–11) As we discuss further below, *Interstate Circuit* does suggest such an analysis would be appropriate, under some circumstances, with or without express vertical agreements.

[86] Turner, *supra,* at 696.

[87] *Id.* at 696–703.

eliminated and the dealer may pursue a policy of charging designated prices without fear of competing discounts.

We do not adopt, however, the proposition that a vertical-horizontal combination, as described in *Interstate Circuit,* has been demonstrated on the basis of this factual record. The significant analytical problem in *Interstate Circuit* was determining whether there was a horizontal combination among distributors. The vertical agreements on the other hand, were express. Consequently, *Interstate Circuit* presented the problem of classifying restraints as vertical, horizontal, or both. Because of the sufficient interdependence among the distributors, the Court found the restraints were horizontal as well as vertical.[88] In *Schwinn,* the Supreme Court also dealt with classifying restraints as vertical or horizontal. The Court gave some guidance for classifying restraints:

> . . . we are here confronted with challenged vertical restrictions as to territory and dealers. The source of the restriction is the manufacturer. These are not horizontal restraints in which the actors are distributors with or without the manufacturer's participation.[89] **[42]**

Later in the opinion the Court emphasized that it was:

> . . . dealing here with a vertical restraint embodying the unilateral program of a single manufacturer. We are not dealing with a combination of manufacturers . . . or of distributors . . . . We are not dealing with a "division" of territory in the sense of allocation by and among distributors . . . or an agreement among distributors to restrict their competition . . . . We are concerned here with a truly vertical arrangement . . . (citations omitted)[90]

In *Coca-Cola Co.,*[91] we considered whether express territorial restrictions on bottlers were vertical only or both horizontal and vertical. There, we considered the history of the territorial restrictions, the essential relationships among the bottlers and the manufacturer, the degree of competition between the manufacturer and the bottlers, and the role of the bottlers in the institution of the restrictions in determining whether they could fairly be characterized as horizontal.[92]

A manufacturer's pronouncement that continued dealing is contingent upon compliance with designated prices, followed by widespread compliance, without more, is insufficient for a finding of such

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[88] In addition to the other factors present in *Interstate Circuit,* there was an absence of testimony on the part of the defendants to rebut the claim of a conspiracy. On the basis of all these factors, the Court held a jury could infer a conspiracy.

[89] *Schwinn,* 388 U.S. at 372.

[90] *Id.* at 378.

[91] 81 F.T.C. 517 (1978).

[92] *Id.* at 610–614. The Commission found that restraints at issue in *Coca Cola* to be more fairly characterized as vertical.

vertical-horizontal combination. In such a situation, there is no evidence that the dealers themselves played a role in initiating the plan, that the manufacturer wishes to avoid horizontal competition [43]between itself and one or more of its dealers, or any other factor suggesting interdependence among horizontal competitors other than the knowledge that other dealers are in the same situation and that, because of the manufacturer's policies, price competition is unlikely. To find a vertical-horizontal combination on those facts alone would call into question the lawfulness of any vertical agreements, express or implied, between suppliers and dealers, by raising an inference of a horizontal combination among dealers.

Moreover, to find such a vertical-horizontal combination on the basis of this "invitation and acceptance" analysis, without other factors suggesting the restraints can be characterized as horizontal, would also cast doubt on the freedom of the manufacturer's initial selection of dealers. An announced policy of initial selection of dealers based on likely pricing policies also creates a degree of confidence on the part of dealers that suggested prices will be followed. As we state further below, however, our interpretation of *Colgate* does not lead to the conclusion that an *initial* decision to distribute through particular dealers, even if made on the basis of their likely pricing policies, is sufficient for a finding of an agreement between the manufacturer and the dealer or among the dealers. In the case of initial customer selection, where there are no express or implied assurances concerning future pricing policies given by the dealer, there is only an expectation that the manufacturer's preferences will be followed. While dealers will have some basis for expecting other distributors, [44]similarly chosen, to follow the manufacturer's pricing policies, there is substantially less ground for this expectation than when the coercion of threatened termination is present. Each dealer is aware that competitor dealers are free to change their pricing practices, permanently or temporarily, without fear of termination. In a relatively unconcentrated market with many sellers, if individual sellers can expand sales and profits by reducing prices, some are likely to do so. Under these market conditions, a high degree of price uniformity is much less likely than if non-complying dealers may be terminated.

As we have stated, when dealers' pricing policies are constrained because of the threat of termination, there is coercion and an agreement is present. Thus, when a manufacturer "invites" a dealer to deal under the condition that continued dealing depends upon compliance with his pricing policies, and, as a result, the dealer follows pricing policies he would not otherwise follow in order to

avoid termination, there is bilateral conduct. On the other hand, when the dealer's pricing policies are unaffected by the threat of termination or other sanctions, such conduct is more appropriately characterized as unilateral, though consistent (or "parallel") with the manufacturer's preferences.[93] **[45]**

Thus, in the situation where dealers follow manufacturer's pricing policies solely because they are confident others will do so and this confidence is based only on the manufacturer's initial customer selection policy, we conclude there is no vertical agreement between the manufacturer and the dealer, nor a horizontal agreement among the dealers.

Similarly, *suggested* prices followed by widespread compliance, without more, does not constitute "invitation and acceptance" sufficient for a finding of vertical-horizontal combinations described in *Interstate Circuit* and *Masonite.* In such a situation, there is insufficient interdependence among the dealers to conclude that they are participants in a horizontal price-fixing scheme; nor is there sufficient bilateral conduct by the supplier and its dealers to find vertical agreements between them. We also agree with respondent that exchanges of market-price information between a manufacturer and its distributors, standing alone, do not imply agreements as to resale prices. (See RAB 51)

4. *Additional Policy Considerations*

Any interpretation of the *Colgate* doctrine carries with it a number of ramifications for manufacturer-supplier dealings and, thus, raises certain significant policy considerations. We address in this section the most important of these considerations, including a number of arguments raised by respondent. **[46]**

(i) *Proof of Agreements*

If, as is our view, an agreement is created when there is unwilling compliance resulting from a threat of termination, it follows that a pricing program which includes an announced threat of termination would likely result in the creation of unlawful agreements. This result follows because manufacturers presumably threaten termination, at least in part, to discourage deviations from their pricing policies. An announced policy of terminating non-complying dealers, *standing alone,* does not *automatically* create a combination because such a policy *standing alone* does not necessarily imply any dealers act to avoid the carrying out of the threat. However, if, as is likely,

[93] Of course, any express or implied assurances or other course of dealing which would create an implied contract has long been held to result in an agreement. *See, e.g., Frey & Sons v. Cudahy Packing Co.*, 256 U.S. 208 (1921). We refer here only to the situation where there is no such implied contract or other behavior by the manufacturer recognized in previous cases to allow for the finding of an agreement.

some dealers do act to avoid termination, their unwilling compliance does give rise to combinations. In short, an announced policy of terminating dealers for non-compliance would not lead to agreements only if it had no effect in influencing dealer behavior, a principal reason for announcing the policy in the first place. Thus, an announced policy of terminating discounters, coupled with widespread compliance, with or without actual terminations, should be adequate to support an inference that there is unwilling compliance and, hence, that there are agreements.[94]

Complaint counsel argue that an *un*announced policy of termination could be pursued by a manufacturer without necessarily resulting in combinations. (CAB 45) They make [47]the theoretical point that an unannounced policy of termination does not necessarily influence dealers' behavior if they remain unaware of it. While this proposition is true in theory, it is likely that any terminations, once they were actually carried out, would be quickly known to other dealers. Thus, while there would be no formally announced policy, the practice of terminating dealers for non-compliance would be well-known through informal communication. As a consequence, there would still be a "communicated danger of termination" and unwilling compliance resulting from dealers' wishing to avoid termination.

Suits claiming vertical price-fixing typically occur after a non-complying distributor has been terminated. The courts have indicated that a party (whether the terminated distributor himself or others) could allege three types of agreements as the basis of a Sherman Act Section 1-type claim. First, he could allege a combination between the supplier and the terminated distributor.[95] The *in pari delicto* doctrine does not bar a claim based on such an agreement. Second, he could claim combinations between the manufacturer and other dealers who have not been terminated.[96] [48]Third, he could claim a combination between the supplier and others, e.g., an agent who solicits sales away from a non-complying distributor.

In our view, a distributor who unwillingly complies with a supplier's pricing policies in order to avoid termination, but who is

[94] *Albrecht v. Herald*, 390 U.S. at 150, n.6; *See also, Yentsch v. Texaco*, 1980–2 Trade Cases at 75,783–84.

[95] *Perma Life Mufflers v. International Parts, supra; Simpson v. Union Oil Co., supra.*

[96] *See, e.g., Perma Life*, 392 U.S. at 142. If a claim of vertical price-fixing could be based only upon an agreement between a supplier and a distributor coerced into compliance, the ironic result would be to deny recovery to a terminated distributor who resists coercion until the supplier stops dealing with him. As Justice Harlan observed, "Obviously it makes no sense to deny recovery to a pressured retailer who resists temptation to the last and grant it to one who momentarily yields but is restored to virtue by the vision of treble damages. It is not the momentary acquiescence but the punishment for refusing to acquiesce that does the damage on which recovery is based." *Albrecht v. Herald*, 390 U.S. at 162.

subsequently terminated after failing to comply, has entered into an agreement with the supplier. Respondent argues (RAB 51–52) that this interpretation would make the crucial evidence of liability turn only on the dealer's state of mind. We disagree. In the absence of an announced policy of terminating discounters and obvious termination on those grounds, a terminated dealer would still have to show that his compliance with the supplier's policies took place in the presence of some indicia of coercion, e.g., termination of other dealers for discounting, monitoring of prices by the manufacturer, etc. Second, he would have to show that the termination was related to his non-compliance.

Similarly, in the case where a terminated dealer relies upon the existence of combinations between the supplier and other distributors, and there is no announced policy of terminating discounters, inference of agreements would have to be established by other credible evidence. As we have stated, *Albrecht* indicates that such an inference is established if there is an announced policy of terminating non-complying dealers, enforcement of the policy, and widespread compliance. In a case where there is no such announced policy, a party **[49]**attempting to show an agreement would be obliged to demonstrate that the supplier had implemented an unannounced policy of terminating non-complying dealers (which inherently creates a threat of termination) or had engaged in other conduct sufficient to create a coercive climate likely to lead to unwilling compliance.[97]

(ii) *Commercial Adherence*

Respondent argues (RAB 51–52) that intepreting the *Colgate* doctrine so as to preclude finding an agreement where there is unwilling compliance based upon threatened termination creates a standard of liability based upon objective factors—the presence of any conduct by a seller beyond an announced threat of termination and actual terminations. In effect, respondent argues that an interpretation of *Colgate* which carves out certain allowable conduct, even though it may be illogical when compared with other condemned conduct, is at least capable of practical **[50]**adherence and proof when challenged. As we have discussed above, however, dealers who claim agreements because of coercion resulting from

[97] *See, e.g., Quinn v. Mobil Oil Co.*, 375 F.2d 273 (1st Cir. 1967), *cert. denied*, 389 U.S. 801 (1967). "The allegation that defendant terminated the lease, despite the fact that plaintiff's business had increased substantially, perhaps came close to raising an inference that defendant was policing a general scheme to fix prices for the area. But this court should not be required to so speculate. Nor is it too much to require this plaintiff, absent the showing of an agreement, *to allege . . . that the acts took place within the larger framework of a pricing program, policy, or conspiracy . . . Id.* at 276. (emphasis added); *See also*, Isaac, *Unilateral Refusal to Deal: Colgate is Dead*, 30 Ohio State L.J. 537, 546 (1969) (hereafter "Isaac"); Turner, *supra*.

threatened termination are required to present evidence beyond testimony as to their state of mind. An additional flaw in respondents' argument, however, is that it is very difficult in a real life business setting to adhere to the narrow sliver of permissible conduct which respondent would allow under *Colgate,* and, rather than aid in reaching correct results in litigation, such a standard may often act as a shield, complicating proof problems and leading to arbitrary results.

As we have seen, the series of decisions interpreting *Colgate* have consistently narrowed the conduct which is arguably permissible under the doctrine. In addition to prohibitions on any written or verbal contractual agreements, there are severe restrictions on implementing any pricing policy which includes a policy of termination for non-compliance. First, it is clear that a manufacturer may not seek express assurances of compliance from distributors that they will comply with the manufacturer's pricing policies.[98] Doing so would surely give rise to an implied agreement. Reinstatement of a previously non-complying distributor would raise a similar inference.[99] Second, involvement of wholesalers or others in implementing a [51]pricing program will be held to have gone beyond a mere refusal to sell.[100] Third, the implementation of a monitoring program to determine if dealers are complying will lead to a finding of coercion and, consequently, a finding of agreement.[101] If a manufacturer goes into competition with a non-complying dealer or arranges with another dealer to do so, in order to induce compliance, it will have created a combination for purposes of the Sherman Act.[102] [52]

In addition to these practical problems in implementing a pricing policy, recent cases suggest that significant economic leverage by the supplier over a distributor creates an additional factor, one going beyond a mere refusal to sell, that may give rise to an agreement. As noted above, the ALJ interpreted the Court's statements in *Albrecht*

[98] *U.S. v. Parke, Davis & Co.,* 362 U.S. at 45–48.

[99] *FTC v. Beech-Nut Packing Co.,* 257 U.S. 441 (1922); *See also* Sullivan, Handbook of the Law of Antitrust 393 (1977) (hereafter "Sullivan").

[100] *Parke, Davis, supra.* Consequently, it has been suggested that manufacturers who distribute through both a one-tier and two-tiered distribution system could not rely on *Colgate* to implement a policy of terminating discounting distributors who buy directly. Since the manufacturer could not control pricing policies of the indirect buyers, it would be obliged to allow direct buyers to compete with them by lowering their prices as well. See Pitofsky and Dam, *supra,* at 778–779.

[101] *Parke, Davis,* 362 U.S. at 43; *FTC v. Beech Nut, supra; U.S. v. Bausch & Lomb, supra.* If other distributors act as informers, there is likely to be found a combination between the manufacturer and the monitoring distributor. If the supplier itself engages in monitoring, the "extra" factor of price monitoring will be said to go beyond a mere refusal to deal under *Parke, Davis.* See Pitofsky and Dam, *supra,* at 779. If a competing distributor complains and termination follows, an inference of a horizontal combination may be raised. *See Cernuto, Inc. v. United Cabinet Corp.,* 595 F.2d 164 (3d Cir. 1979). *See also, Harold Friedman, Inc. v. Thorofare Markets, Inc.,* 458 F.2d 127 (3d Cir. 1978).

[102] *Albrecht v. Herald, supra.*

as turning on the particular economic vulnerability of the franchisee to termination. (ID 16–18). Some scholarly commentary also argues that the economic power of the manufacturer over the dealer creates another exception to any *Colgate*-created right of a manufacturer to enforce a pricing policy through threats of termination.[103]

We believe such a distinction based upon the presence of economic leverage over the distributor is unsound in theory and inconsistent with case precedent. As we discussed above, cases in which the supplier has a lease with a short-term concellation right is no different from a supplier who decides whether to continue dealing with a distributor. In both cases, there is not necessarily a contractual obligation for the supplier to continue to deal. However, making continuation of dealing contingent upon the dealer's **[53]** performance of some condition leads to bilateral conduct if the dealer's policies are thereby affected. Moreover, unwilling compliance with the supplier's pricing policies to avoid termination necessarily implies some leverage over the dealer. In any event, adopting a theory of leverage as an "extra" factor would add an additional element of ambiguity and uncertainty in adhering to the interpretation of the *Colgate* doctrine advocated by respondent.

As the ALJ commented, it is doubtful that in the real world a pricing policy could be implemented which included an announced threat of termination without running afoul of one of the *Colgate* exceptions. (ID 22) And as one court commented, even before the *Schwinn, Albrecht,* and *Perma Life* decisions, "[t]he Supreme Court has left a narrow channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise."[104] Antitrust scholars appear to be in general agreement that the ability to implement an announced policy of terminating discounters without engaging in any additional conduct that **[54]**could be said to go beyond a "mere declination to sell" is unlikely.[105] Finally, antitrust counseling and business planning generally do not rely upon the Court's original statement of the *Colgate* doctrine to protect a policy of terminating discounters from antitrust liability.[106]

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[103] Isaac, *supra*, at 542–550; Sullivan, *supra*, at 394.

[104] *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787, 790 (2d Cir. 1960).

[105] Pitofsky and Dam, *supra*, at 778–781; Halper, 22 *Antitrust L.J.* 49 (1963); Sullivan, *supra*, at 394–395.

[106] See, e.g., Sullivan, *supra*, at 394–395. "*Colgate* . . . may often suggest itself to a defendant as a small sheet to windward, but it is quite useless as a planning device or as a basis for counseling. No firm may with any confidence plan to execute a program for maintaining resale prices through policy announcement and exercise of its right to refuse to deal." *Id.* at 395.

See also a hypothetical colloquy created as a practical guide to commercial practice appearing in a reprint of the proceedings of the National Institute on Antitrust Counseling and the Marketing Process, 49 Antitr. L.J. 415, 483 (1981).

(Continued)

These considerations, we believe, strongly support our interpretation of the *Colgate* doctrine. We are reluctant to interpret any legal doctrine in a way that makes practical adherence to it so difficult.

(iii) *Imposing Liability on Coerced Dealers*

It can be argued that interpreting the *Colgate* doctrine so as to find agreements when dealers are coerced into compliance through threatened termination unfairly subjects [55]dealers to liability for their participation in a vertical price-fixing conspiracy. We disagree. Sherman Act analysis has, for the most part, not distinguished between parties based upon whether they were more or less culpable as long as they were found to be parties to an unlawful combination. Consequently, a dealer would theoretically be liable under respondent's interpretation of *Colgate* in cases where the dealers are coerced into compliance by price-monitoring or by explicit threats from sales representatives, or are persuaded to give express assurances of future compliance, written or verbal, to the manufacturer. Under all these situations, combinations have been found and, at least in theory, the coerced dealers were party to a vertical price-fixing conspiracy, despite the fact that they were coerced by the manufacturer into sacrificing pricing freedom they would prefer to retain.[107] The same result of dealer liability occurs if a non-complying distributor is reinstated on the understanding that he will comply in the future or if a supplier coerces compliance by temporarily reducing the amount of supplies furnished to the dealer for resale. Thus, we do not understand how an interpretation of *Colgate* which finds agreements on the basis of compliance coerced by threatened termination is any more or less fair to dealers [56]than finding agreements on the basis of other types of coercive devices.[108] In practice, of course, the defendant in resale price-fixing cases is the manufacturer who instituted and enforced the policy.

5. *Conclusion*

We conclude that the *Colgate* doctrine, as it stands today, does not

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[The businessman]: Am I going to get in trouble if I just terminate the discounters when I find out about them?

[The lawyer]: There's an old case called *Colgate* and some other decisions that followed it under which it is theoretically, and I emphasize the word "theoretically," possible for a manufacturer like yourself to announce the suggested resale price and thereafter unilaterally terminate customers who don't observe them. As a matter of practice, however, it is almost impossible to find, or for the courts to find, such pure unilateral conduct.

[107] A theory of agreement based upon combinations between the supplier and dealers who are coerced into compliance by a threat of termination does not result in the conclusion that all dealers who comply with the manufacturer's pricing policies are parties to an agreement. Dealers who comply based on their own preferences and without regard to a fear of sanctions are not engaging in bilateral conduct with the supplier.

[108] See Turner, *supra*, at 688. "It is not tacit agreement for a distributor to resell at the price suggested by the manufacturer when, but for the manufacturer's declaration of policy, he would sell for less? One might argue that it is not "agreement" when the distributor is *coerced* into following the minimum price, but the same thing could be said of the case where the distributor is coerced into a contractural commitment to do so."

preclude, as a matter of law, a finding of agreement when a buyer unwillingly complies with a supplier's pricing policies in order to avoid termination. There is no sound basis, either in legal precedent or theory, for reaching the illogical result that this conduct is only unilateral.

Our interpretation of the *Colgate* doctrine, we believe, is consistent with the Supreme Court's most recent statements. Fundamentally, the concern of Section 1 of the Sherman Act is with agreements, in which one or more parties have sacrificed some element of their commercial freedom in return for express or implied assurances of other parties to the arrangement. In the case of vertical price-fixing, the Sherman Act's prohibition is aimed at agreements limiting [57] the freedom of the dealer to set prices. We see no logical basis for concluding that a dealer who restricts his pricing policies in return for some assurance of continued dealing has not entered into an agreement with the supplier. An announced policy of terminating non-complying dealers is the practical equivalent of providing some assurances of future dealing in return for the dealer's restricting his pricing policies.

We emphasize that our view of the *Colgate* doctrine does not restrict the discretion of a seller in deciding with whom he will deal initially. An initial decision to distribute only through non-discounters, for example, would not give rise to a finding of bilateral conduct. Initial customer selection, standing alone, does not raise an inference of unwilling compliance on the part of the distributor because there is no conduct required of the distributor for future dealing. Conditioning *continuing* dealing on any particular conduct, e.g., charging particular prices, on the other hand, is the equivalent of a communicated threat of termination.

We believe this right of *initial* customer selection is the meaning of *Colgate* as it stands today. Thus, we agree with respondent that there continues to be a *Colgate* doctrine and that it can be stated in terms of the "long recognized right of trader or manufacturer, engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will [58]deal."[109] This language was recently cited with approval by the Supreme Court.[110] However, this phrase, as we have seen, has been much qualified as the Court has continually refined its meaning. It does not mean that compliance with a pricing policy in order to avoid

[109] *U.S. v. Colgate*, 250 U.S. 300, 307 (1919).

[110] *Reeves, Inc. v. Stake*, 100 S. Ct. 2271, 2278 (1980). *See also, Official Airlines Guides, Inc. v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980).

termination, as is presented in this case, does not give rise to an agreement.

We also emphasize that our interpretation of *Colgate* does not effect the right of a seller to suggest resale prices. The very term "suggested" prices implies that the dealer is free to follow them if he wishes. Compliance with suggested prices, entirely based on the dealer's own preferences and without influence of a threat of termination or other sanctions, does not lead to a finding of combination between the dealer and the manufacturer.

IV. RESTRAINT OF TRADE

To violate the Sherman Act, an agreement must constitute a "restraint of trade" within the meaning of the Act. It has long been held that the Act prohibits certain undue **[59]**restraints which, because of their inherent nature or effect and because of their anticompetitive purpose harm competition.[111] Some types of agreements are conclusively presumed to be unreasonable, that is unreasonable *per se,* and therefore unlawful without the necessity of inquiring about their effect in a particular case.[112] Since *Dr. Miles,* vertical price-fixing has been found to be unlawful under the Sherman Act. In 1951, the Court held in *Kiefer-Stewart Co. v. Joseph Seagram & Sons, Inc.*[113] that vertical price-fixing is illegal *per se.* In 1977, the Supreme Court in *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.,*[114] restated that the vertical price restrictions were *per se* unlawful.[115] **[60]**

Applying the *per se* standard of illegality to respondent's practices, we find that they violate the Sherman Act and the FTC Act. Respondent has entered into agreements with dealers which have the purpose and effect of fixing or stabilizing resale prices. But for these agreements, some dealers would sell at less than Stover's designated prices.

We are, of course, aware of the important debate among antitrust scholars, economists and others concerning the proper standard to be applied in analyzing resale price maintenance agreements.[116] How-

[111] *U.S. v. American Tobacco Co.,* 221 U.S. 106 (1911); *Standard Oil Co. v. U.S.,* 221 U.S. 1 (1911).

[112] *Northern Pac. R. Co. v. U.S.,* 356 U.S. 1 (1958).

[113] 340 U.S. 211, 213 (1951).

[114] 433 U.S. 36 (1977).

[115] *Id.* at 51, n.18. The Court noted that ". . . Congress has recently expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and the McGuire Acts allowing fair-trade pricing at the option of the individual states." *Id. See, also, California Retail Liquor Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97 (1980).

[116] *See, e.g.,* Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision,* 45 U. Chi. L. Rev. 1 (1977); Bork, *Vertical Restraints; Schwinn Overruled,* 1977 Supreme Court Review 177 (1977); Anderson, *The Antitrust Consequences of Manufacturer - Suggested Retail Prices - The Case for Presumptive Illegality,* 54 Wash. L.R. 763 (1979).

ever, we do not believe the issue of *per se* legality of resale price restrictions is open to serious legal dispute given the recent pronouncements of the Court in *Sylvania* and *Midcal*. Consequently, we believe the factual record in this case is clearly sufficient to demonstrate that there has been a "restraint of trade" within the meaning of the Sherman Act.

We disagree with respondent that our interpretation of the permissible limits of manufacturer conduct under *Colgate* should be affected by the current debate over the proper standard of analysis to be applied in assessing the anti-competitive effect of resale price restrictions. Whether a *per se* standard, or "rule of reason," approach is applied in evaluating these restrictions, the question of what constitutes **[61]**bilateral conduct under the Act remains. In any event, we believe our application of the *per se* standard of illegality to resale price restrictions comports squarely with the Supreme Court's most recent opinions.

V. THE APPROPRIATE REMEDY

The parties have stipulated to the entry of certain order provisions if Stover is found to have violated the Sherman Act and the FTC Act as alleged in the Complaint. (JX ¶26). This stipulated order has four parts. Part I prohibits Stover from engaging in certain conduct which may have the effect of fixing or establishing resale prices. Part II requires Stover to add new retailers, equivalent to 10% of the number of Stover retailers existing on the date the order becomes final. These new retailers are required to be stores which generally price below manufacturers' suggested prices and must be distributed in proportion to population throughout SMSA's. Part II also requires Stover to communicate the provisions of Part I to retailers who were terminated for discounting any time after January 1, 1976, to current retailers and, for five years, to new retailers. Further, Part II requires Stover to advertise the terms of the order in trade publications and inform certain officers and sales personnel of its terms. Finally, Part II requires Stover to offer to reinstate dealers terminated since January 1, 1976, in whole or in part because of the price at which it advertised or sold Stover products. **[62]**Stover may refuse to reinstate these retailers only if its reasons are wholly unrelated to resale price.

Part III of the stipulated order requires Stover to pay for a survey of resale prices of Stover products in the second year after this order becomes final. If the results of the survey establish that more than 87.4% of Stover's products are sold at Stover's suggested prices, then

Stover must stop suggesting resale prices for three years. However, if less than 87.4% of Stover items are being sold at suggested prices, Stover's obligation to solicit new dealers who are discounters will terminate. Moreover, Stover may request a comparable survey within one year after the final date of the order. If less than 87.4% of Stover items are sold at designated prices, Stover need not continue to add discounters or pay for the above-described survey.

Part IV includes standard reporting and compliance provisions.

We believe this is, in general, an appropriate order and one likely to "restore . . . competitive conditions to at least the state of health which they might have expected to enjoy but for the unlawful conduct."[117] It is well-settled that the Commission has broad discretion in fashioning appropriate relief as long as it is reasonably related to [63]the offense.[118] Moreover, the fact that the parties stipulated to this order, if liability should be found, indicates that the practical implementation of the order, should it be entered, was the subject of discussion and negotiation by both sides.

Part I of the order should prevent further agreements between Stover and its dealers, and, in particular, make clear to dealers they no longer are under threat of termination for failure to comply with suggested prices. Part II is clearly intended to restore price competition to Stover's dealer network. The addition of previously terminated dealers likely to sell at below suggested prices will help eliminate the effects of Stover's prior policy of terminating those who did not comply with its pricing policies. The survey provisions of Part III represent a creative effort to provide a strong incentive to Stover to comply with the other order provisions.

Despite the fact the parties have stipulated to an order, we do not feel it is appropriate to include in our order all these provisions under the circumstances of this case. Consequently, we modify the order in the following respects. Paragraph I(F) of the order prohibits Stover from "[r]efusing to deal with any retailer because of the resale price at which Russell Stover believes that retailer will advertise, [64]offer for sale or sell any Russell Stover product or because of the resale price at which that retailer advertises, offers for sale or sells any other merchandise." As we have stated, our view of the *Colgate* doctrine does not prohibit a manufacturer from *initial* selection of customers, even if such selection is based upon the seller's belief about the pricing policies the customer is likely to follow. While such a provision, perhaps limited in duration, may be appropriate under

[117] *Ecko Products Co.*, 65 F.T.C. 1163, 1216 (1964).

[118] *See FTC v. Ruberoid Co.*, 343 U.S. 470, 423 (1952); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946); *Corning Glass Works v. FTC*, 509 F.2d 293, 303 (1975).

some circumstances, either as a curative device or a "fencing-in" provision, we do not feel it is appropriate here. Consequently, we have eliminated I(F) from our order. Similarly, we have eliminated any requirement that Stover add additional retailers other than those previously terminated. On the other hand, a temporary prohibition on suggested resale prices is a conventional remedy for resale price agreements.[119] Consequently, we retain the survey requirement and the prohibition on suggested prices which is contingent upon a survey finding of high price uniformity. Because these modifications have the effect of eliminating restrictions on Stover's pricing policies, we do not believe Stover is prejudiced by these modifications of the order to which it has stipulated. Nevertheless, should respondent object to these modifications, it may raise its objection upon a petition for reconsideration.

DISSENTING STATEMENT OF CHAIRMAN MILLER

The evolution of rules governing vertical restraints has not been a proud chapter in the history of antitrust. This case involves one such restraint—resale price maintenance (RPM). It also involves the closely-related *Colgate* doctrine,[1] which carves out a narrow area of legality for manufacturers wishing to employ RPM. Today, the Commission "reinterprets" the *Colgate* doctrine in a manner that shrinks the scope of *Colgate's* protection by expanding the reach of a second, far more questionable, antitrust rule—the *per se* condemnation of RPM.

In a nutshell, the majority holds that where distributors' "unwilling compliance" with a manufacturer's RPM program results from the manufacturer's announced policy of termination, there is sufficient "coercion" to satisfy the combination element of Section 1 of the Sherman Act. Perceiving this holding to be inconsistent with the *Colgate* doctrine, the majority decides the doctrine must yield. The majority indicates that manufacturers remain free under *Colgate* to state a policy of terminating dealers who do not abide by the manufacturers' pricing policies. It is clear from the opinion, however, that such conduct is "protected" only if the dealers pay no attention to it. (Majority Opinion at 46.) Thus, under the majority's interpretation the *Colgate* doctrine is applicable only in situations where it is irrational and futile for a manufacturer to make the "protected threat" in the first place. As the [2]majority concedes elsewhere, all that it really believes remains of *Colgate* is the

[119] *See, e.g., Amway Corporation*, 93 F.T.C. 618, 725 n. 25 (1979).

[1] *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

manufacturer's right to choose its dealers in the first instance, a right I had not thought required a "doctrine" of its own. (Majority Opinion at 57.)

I do not disagree with the majority that an antitrust "combination" can be established on the basis of the stipulated record here. I do not disagree that the challenged practices are therefore subject to antitrust scrutiny under Section 1 of the Sherman Act (and hence Section 5 of the FTC Act). Rather, I part company with the majority because of the automatic condemnation of the RPM combination found here, especially on the basis of the very sparse record, which the Administrative Law Judge found may inaccurately reflect the true facts in this case. (ID 23.) I also disagree with the theory of agreement upon which they rely to trigger the Sherman Act Section 1 analysis. Therefore, I must respectfully dissent.

The *Colgate* doctrine has, from its inception, been based in part upon a recognition by the Supreme Court that manufacturers must be allowed *some* flexibility in organizing distribution systems for their products. In fashioning and subsequently refining the doctrine, the Supreme Court has, I believe, implicitly recognized that the rule of *per se* illegality adopted by the Court in 1911[2] sweeps too broadly as applied to RPM. Hence, the Court subsequently devised a safety valve in the form [3]of the *Colgate* doctrine.[3] In my reading of the *Colgate* doctrine, distribution systems such as Russell Stover's would be permitted as a matter of antitrust policy. While far from satisfying, the doctrine has avoided some of the mischief that results from application of the *per se* rule.

Not surprisingly, the stipulated facts show no competitive harm resulting from Russell Stover's distribution system. Every manufacturer, Stover included, has the incentive to distribute its product in a cost-effective, pro-competitive manner. Nevertheless, the majority condemns Stover's distribution system because, they say, it violates the *per se* rule. The rationale for *per se* rules is to save judicial resources by obviating the need for economic analysis of practices that impose costs and create virtually no benefits. But the *per se* rule against RPM automatically prohibits practices that, depending on circumstances, may generate substantial benefits to competition and impose virtually no costs.

In this case, rather than examining the competitive impact of the respondent's distribution system cum RPM, the Commission's resources have been devoted to developing a "coercion" theory under

[2] *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

[3] *See* Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is Sylvania a Way Out?* 67 Va. L. Rev. 1457 (1981).

which distributors who "unwillingly" adhere to a suppliers pricing policy are deemed to be "coerced" into doing so, thereby establishing a vertical agreement to fix prices. But just as a legal matter, the majority's preoccupation with "coercion" [4]suffers from two principal defects: first, the theory broadens the notion of "coercion" beyond the more appropriate economic concept of a response to true market power; and second, it displaces the more principled analysis of "combination" that has developed in horizontal restraint cases under the Sherman and FTC Acts.

The majority appears to say that "coercion" exists whenever a manufacturer induces its distributor to act in a way contrary to the distributor's own preferences. (Majority opinion at 36–37.) But the preferences of independent distributors will rarely, if ever, be identical to those of their suppliers. Distributors will always prefer to deal on terms more advantageous to themselves, to the detriment of their supplier. For example, a retailer has strong incentives to have the manufacturer bear the costs of servicing, promoting or delivering the products. The manufacturer, in turn, has the incentive to ensure, by establishing obligations or inducements, that the retailer market its product effectively. Especially where other manufacturers stand ready to distribute comparable products to the retailer, I believe little case can be made for economic coercion simply because one or more manufacturers attach such conditions to the sale of their products.

The stipulated record states that Stover competes with seven named, well-known candy manufacturers "among other companies." (Stipulated Finding 8.) While this record makes it difficult to determine with certainty that Stover's competitors stood ready to supply those dealers terminated by Stover for non-adherence to [5]its designated resale prices, I believe we must presume so, absent evidence to the contrary. Thus, contrary to establishing "coercion," I believe the only inference to be drawn safely from this sparse record is that the terms offered by Stover—including the policy on resale prices—are viewed by its distributors as marginally superior and preferable to those that could be obtained from Stover's competitors.

The majority asserts that an "invitation-acceptance" test for agreement would sweep too broadly. (Majority Opinion at 43.) However, use of the broad "coercion" standard as reinterpreted by the majority today may have that very effect. I cannot see how the majority's loose standard for "coercion" in finding combinations can be limited any more than an "invitation-acceptance" approach. More fundamentally, even if the majority's concern were warranted, the problem would result not because agreements would be found when

none actually existed, but because of the severe consequences that flow from the finding of an RPM agreement. To find such an agreement is to declare it automatically unlawful. I believe a more prudent approach would be to adopt a consistent definition of "contract, combination, or conspiracy" for both vertical and horizontal arrangements, and to base the resulting antitrust conclusions on analysis of their competitive effects.

To avoid harsh (and in many cases anticompetitive) results, adjudicators must now resort to legal contortions of the type found in the majority's opinion to accomplish one of two objectives: to find no vertical "combination" where one clearly [6]exists; or to find some boycott, surveillance or "coercion" that is sufficiently distasteful to justify invoking *per se* condemnation. More importantly, today's decision does nothing to address the underlying problem in the area of vertical price restraints—namely, the inappropriateness of the prevailing rule of *per se* illegality. The result in this case—the automatic prohibition of a distribution system previously considered permissible—dramatically emphasizes the need to analyze vertical price restraints, like vertical customer and territorial restrictions, under the rule of reason. Until that happens, we can expect to continue seeing lengthy opinions that shed little light on the actual competitive effects of the RPM arrangements under scrutiny.

CONCURRING STATEMENT OF COMMISSIONER CLANTON

With respect to the continued treatment of resale price maintenance as *per se* illegal, I do not believe this case provides the appropriate vehicle for an extensive reevaluation of the present legal distinction between price and nonprice vertical restraints. While I am not averse to further examination of this issue, I would do so only in the context of the kind of thorough review that is now underway at the Commission. In the meantime, in light of the distinct competitive concerns associated with RPM[1] and the current judicial treatment of this practice, I continue to support a *per se* approach.

Final Order

This matter having been heard by the Commission upon the

[1] The *per se* treatment of resale price maintenance is premised on the likelihood that such agreements may facilitate price monitoring and coordination at the interbrand level. It has also been argued that resale price maintenance results in distributional inefficiency by encouraging proliferation of outlets without regard to economies of scale or other cost considerations. See Fair Trade Laws: Hearings on S. 408 (Consumer Goods Pricing Act of 1975) Before the Subcommittee on Antitrust and Monopolies of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. 49 (1975) (Statement of Thomas Gale Moore); B.S. Yamey, ed., *Resale Price Maintenance* 96 (Aldine, Chicago, 1966); Report of the Federal Trade Commission on Resale Price Maintenance (1945).

appeal of Complaint Counsel from the initial decision, and upon briefs and oral argument in support thereof, and in opposition thereto, and the Commission, for reasons stated in the accompanying opinion, having granted the appeal:

It is ordered, That the order dismissing the complaint entered by the administrative law judge is vacated, and the following cease and desist order is entered.

Order

For purposes of this Order, the following definitions shall apply:

Product means any candy items which Russell Stover manufactures or sells to retailers.

Retailer means each location of any person, partnership or corporation, not owned by Russell Stover, which purchases candy directly from Russell Stover for resale to the public. [2]

Prospective retailer means each location of any person, partnership or corporation, not owned by Russell Stover, which requests or indicates a desire to purchase any product from Russell Stover for resale to the public.

Resale price means any price, price floor, price ceiling, price range, or any mark-up, formula, margin of profit or any other technique for pricing any product at retail.

Designates or *designated* means the selection by Russell Stover of the prices at which it desires that its retailers sell Russell Stover products.

I.

It is ordered, That Russell Stover Candies, Inc. ("Russell Stover"), a corporation, through its successors, assigns, officers, directors, employees, agents, representatives, licensees, subsidiaries, divisions or any other corporate or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist directly or indirectly from:

A. Entering into, establishing, exacting assurances to comply with, continuing, enforcing or announcing the terms of any contract, combination, agreement, understanding or arrangement to fix, establish, control, maintain or enforce the resale price at which any retailer or prospective retailer may advertise, offer for sale or sell any product.

B. Communicating, publishing, circulating, disseminating, or providing by any means, not intended for and not likely to be seen by consumers, any resale price unless it is clearly and conspicuously stated on each page of any list, advertisement, or other document or communication where any resale price appears: [3]

THIS [THESE] RETAIL PRICE[S] IS [ARE] SUGGESTED ONLY. YOU ARE COMPLETELY FREE TO DETERMINE YOUR OWN PRICE.

C. Communicating, publishing, circulating, disseminating, or providing by any means, intended for or likely to be seen by consumers, any resale price, unless it is clearly and conspicuously stated:

SUGGESTED PRICE OPTIONAL WITH RETAILER.

except that any resale price communicated by preticketing a product by tag, ticket, label, sticker, or other comparable marking must clearly and conspicuously state:

SUGGESTED PRICE ONLY.

D. Representing that any action may or will be taken against any retailer because of the resale price at which that retailer has advertised, offered for sale or sold any Russell Stover product, or because of the resale price at which that retailer may advertise, offer for sale or sell any Russell Stover product.

E. Terminating, suspending, delaying shipments to, or taking any other action against any retailer because of the resale price at which that retailer has advertised, offered for sale or sold any Russell Stover product.

F. Soliciting, gathering or transmitting data concerning the resale price at which any specific retailer has, or was alleged to have, advertised, offered for sale or sold any Russell Stover product.

II.

It is further ordered, That Russell Stover shall:

A. Within sixty (60) days from the date on which this Order becomes final, mail or deliver to every Russell Stover retailer and obtain a receipt for, an appropriate notice approved in advance by the Bureau of Competition explaining the provisions imposed by Part I of this Order. [4]

B. For five (5) years from the date on which this Order becomes

final, mail or deliver and obtain a receipt for an appropriate notice, approved in advance by the Bureau of Competition, explaining the provisions imposed by Part I of this Order to any new retailer that purchases any product from Russell Stover. The mailing or delivery required by this paragraph shall occur before the first purchase by the retailer.

C. Within ninety (90) days from the date on which this Order becomes final, have printed an advertisement containing an appropriate notice explaining the provisions imposed by Part I of this Order in two successive issues of trade publications that are generally circulated to Russell Stover retailers. The advertisements shall be no less than one-half page. The contents of the advertisements and the trade publications in which they appear shall both be approved in advance by the Bureau of Competition.

D. Within sixty (60) days from the date on which this Order becomes final, mail or deliver and obtain a receipt for an appropriate notice and an offer of reinstatement, both approved in advance by the Bureau of Competition, to each retailer that was terminated by Russell Stover and to each retailer with whom Russell Stover refused to deal, at any time after January 1, 1976, in while or in part because of the resale price at which it advertised, offered for sale or sold any Russell Stover product or at which Russell Stover believed its products would be advertised, offered for sale or sold. Russell Stover may refuse to open these retailers that request reinstatement only if the refusal is wholly for reasons not related to resale price.

E. Provide copies of this Order to all present and future Russell Stover officers and sales personnel. [5]

III.

A. *It is further ordered,* That Russell Stover shall pay for a survey to ascertain the percentage of Russell Stover products sold at resale prices designated by Russell Stover. The survey will be conducted by Louis Harris & Associates, Inc., or a similarly qualified organization chosen by the Bureau of Competition, using the same procedures and techniques utilized in the Louis Harris survey conducted in April 1980, referred to in paragraph 23 of the stipulated record in this matter. Upon request from the Bureau of Competition, Russell Stover shall submit within ten (10) days a printed list of the names and addresses of its current retailers. The survey will be conducted during the second year following the date upon which this Order becomes final at a time not known in advance by Russell Stover and chosen at the sole discretion of the Bureau of

Competition. If the results of the survey establish that more than 87.4% of Russell Stover products are sold by retailers at Russell Stover's designated resale prices, then the following provision shall take effect immediately upon receipt by Russell Stover of written notice from the Bureau of Competition and shall expire three (3) years thereafter:

It is ordered, That Russell Stover, through its successors, assigns, officers, directors, employees, agents, representatives, licensees, subsidiaries, divisions or any other corporate or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist directly or indirectly from designating and communicating any resale price to any person by price list, discount schedule, invoicing procedure, advertisement, promotional material, preticketing or other prepricing of products, or by any other means. **[6]**

B. At any time within one year from the date on which this Order becomes final, Russell Stover may request that the Bureau of Competition direct that a survey identical to that specified in paragraph III(A) be conducted, to be paid for by Russell Stover. The Bureau of Competition shall cause the survey to be conducted within six (6) months after receipt of the request. If the results of the survey establish that 87.4% or less of Russell Stover products are sold by retailers at Russell Stover's designated resale prices, Russell Stover need not comply further with paragraph III(A) of this Order.

IV.

It is further ordered, That Russell Stover shall:

A. Notify the Commission at least thirty (30) days prior to any proposed change in Russell Stover such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation of or dissolution of subsidiaries or any other such change in the corporation which may affect compliance obligations arising out of this Order.

B. Within sixty (60) days from the date on which this Order becomes final, and annually each year for five (5) years thereafter, file with the Commission a written report setting forth in detail the manner in which Russell Stover has complied with each of the provisions of this Order; and include with its annual reports or as

supplements thereto such documentation as may be required in writing by the Bureau of Competition.

Chairman Miller dissented.

IN THE MATTER OF

ONKYO U.S.A. CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3092. Complaint, July 2, 1982—Decision, July 2, 1982

This consent order requires a Ramsey, New Jersey manufacturer and seller of audio components to cease, among other things, attempting to fix the resale prices at which its products are advertised or sold, through coercion or otherwise. The firm is also barred from restricting the lawful use of its trademarks and brand names; seeking the identity of dealers who deviate from suggested resale prices; and disseminating suggested resale prices for a period of two years, unless such prices are accompanied by a specified disclosure statement. The order further requires the firm to send a copy of the order to all sales and advertisting personnel and, for a three-year period, to mail to all present and future accounts, a letter describing the order.

Appearances

For the Commission: *Jeffrey A. Klurfeld.*

For the respondent: *Richard R. Lury, Seki, Jarvis & Lynch,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Onkyo U.S.A. Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

For purposes of this complaint, the following definitions shall apply:

Product is defined as any audio component, including but not limited to any tuner, amplifier, tape deck, receiver, speaker, changer, turntable or headphone, or any related product, which is manufactured, offered for sale or sold by respondent Onkyo U.S.A. Corporation.

Dealer is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

Resale Price is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any retail price suggested or established by respondent, any customary resale price or the retail price in effect at any dealer.

PARAGRAPH 1. Respondent Onkyo U.S.A. Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 200 Williams Drive, Ramsey, New Jersey.

PAR. 2. Respondent is now, and for some time last past, has been engaged in the manufacture, advertising, offering for sale, sale and distribution of products as hereinabove defined.

PAR. 3. Respondent maintains, and has maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. Respondent sells and distributes its products directly to retail dealers located throughout the United States who resell respondent's products to the general public.

PAR. 5. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the manufacture, advertising, offering for sale, sale or distribution of merchandise of the same general kind and nature as merchandise manufactured, advertised, offered for sale, sold or distributed by respondent.

PAR. 6. By various means and methods, respondent has effectuated and enforced a practice and policy in various States of the United States by which it can and does fix, control, establish, manipulate and maintain the resale prices at which its products are advertised, offered for sale and sold by certain of its dealers.

PAR. 7. By means of the aforesaid acts and practices and more, respondent, by agreement or understanding, express or implied, with certain of its dealers has established, maintained and pursued a planned course of action to fix and maintain the resale prices at which its products will be resold.

PAR. 8. The aforesaid acts and practices of respondent have been and are now having the effect of hampering and restraining competition in the resale and distribution of respondent's products, and, thus, are to the prejudice and injury of the public, and consititute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and

practices of respondent as herein alleged, are continuing and will continue in the absence of the relief herein requested.

STATEMENT REGARDING MODIFICATION OF CONSENT AGREEMENT WITH ONKYO U.S.A. CORPORATION

The Federal Trade Commission provisionally accepted and sought public comment on a consent agreement negotiated by its staff and Onkyo U.S.A. Corporation. That agreement was entered to settle proposed charges that Onkyo engaged in resale price maintenance in the sale of audio components. As originally presented to the Commission, the proposed consent order contained a two-year ban on Onkyo's use of suggested resale prices, as well as a prohibition against Onkyo's restriction of dealers' prices. Upon final consideration, the Commission has determined that the moratorium on suggested resale prices constitutes relief that is inappropriate under the circumstances of this particular case. Therefore, the Commission has removed the prohibition on the use of suggested resale prices from the order.* In modifying the proposed consent order in this fashion, the Commission continues to recognize that, in some circumstances, the use of suggested resale prices may serve procompetitive purposes. For example, suggested resale prices may be especially beneficial to manufacturers seeking to enter markets in which essential information about products—such as relative quality and value—is complex. Thus, the Commission will continue to evaluate the need for a ban on suggested resale prices as a remedy on a case-by-case basis.

In prohibiting Onkyo from restricting its dealers' prices, the Commission intends to prohibit only those actions that are aimed at maintaining specific resale prices (or maintaining prices within a particular range). However, the order does not preclude Onkyo from initially selecting its dealers and establishing performance criteria that are otherwise reasonable under the antitrust laws. The fact that a dealer who failed to live up to those criteria might also be a discounter would not necessarily preclude Onkyo from taking corrective action against the dealer, so long as the termination was undertaken for legitimate reasons related to those criteria and not as a means of coercing resale price maintenance.

Decision and Order

The Federal Trade Commission having initiated an investigation

* Under the order, Onkyo will still be required clearly and conspicuously to label any suggested resale prices as such.

of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that the complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Onkyo U.S.A. Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 200 Williams Drive, in the City of Ramsey, State of New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For the purposes of this Order, the following definitions shall apply:

Product is defined as any audio component, including but not limited to any tuner, amplifier, tape deck, receiver, speaker, changer, turntable or headphone, or any related product, which is manufactured, offered for sale or sold by respondent Onkyo U.S.A. Corporation.

Dealer is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

Resale Price. is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any retail price suggested or established by respondent, any customary resale price or the retail price in effect at any dealer.

It is ordered That respondent Onkyo U.S.A. Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I

1. Fixing, establishing, controlling or maintaining, directly or indirectly, the resale price at which any dealer may advertise, promote, offer for sale or sell any product.

2. Requesting, requiring or coercing, directly or indirectly, any dealer to maintain, adopt or adhere to any resale price.

3. Requesting or requiring, directly or indirectly, any dealer to report the identity of any other dealer who deviates from any resale price; or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating said dealer.

4. Requesting or requiring that any dealer refrain from or discontinue selling or advertising any product at any resale price.

5. Conducting any surveillance program to determine whether any dealer is advertising, offering for sale or selling any product at any resale price, where such surveillance program is conducted to fix, maintain, control or enforce the resale price at which any product is sold or advertised.

6. Terminating, coercing or taking any other action to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product.

7. Taking any action to hinder or preclude the lawful use by any dealer of any of respondent's trademarks in conjunction with the sale or advertising of any product.

II

It is further ordered, That respondent shall clearly and conspicuously state the following on each page of any list, advertising, book, catalogue or promotional material where respondent has suggested any resale price to any dealer:

THE RESALE PRICES QUOTED HEREIN ARE SUGGESTED ONLY. YOU ARE FREE TO DETERMINE YOUR OWN RESALE PRICES.

III

It is further ordered, That respondent shall:

1. Within thirty (30) days after service of this Order, mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to each of its present accounts. An affidavit shall be sworn to by an official of respondent verifying that the attached Exhibit A was so mailed.
2. Mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to any person, partnership, corporation or firm that becomes a new account within three (3) years after service of this Order.

IV

It is further ordered, That respondent shall forthwith distribute a copy of this Order to all operating divisions of said corporation, and to present or future personnel, agents or representatives having sales, advertising or policy responsibilities with respect to the subject matter of this Order, and that respondent secure from each such person a signed statement acknowledging receipt of said Order.

V

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the Order.

VI

It is further ordered, That respondent shall within sixty (60) days after service upon it of this Order, file with the Commission a report,

in writing, setting forth in detail the manner and form in which it has complied with this Order.

EXHIBIT A

Dear Dealer:

Onkyo U.S.A. Corporation has agreed with the Federal Trade Commission to the entry of an order concerning certain distribution practices. Our agreement was solely for the purpose of settling a dispute with the Commission, and does not constitute any admission on our part that we have violated any law. The agreed-to order provides, among other things, as follows:

With respect to resale prices:

1. You are free to charge whatever retail prices you deem appropriate for any Onkyo audio component or related product, and you may advertise those prices as you see fit.

2. You can be assured that Onkyo will not take any action against you for any prices which you may charge or advertise.

If you wish a copy of the full text of the agreed-to order, or if you have any questions concerning it, please call [name of Onkyo official].

_____

for Onkyo U.S.A. Corporation

IN THE MATTER OF

BELTONE ELECTRONICS CORPORATION, ET AL.

Docket 8928. Interlocutory Order, July 6, 1982

ORDER EXTENDING INTERIM *IN CAMERA* TREATMENT AND ORDERING MOVANTS TO SHOW CAUSE

By order of October 19, 1979, the Administrative Law Judge granted *in camera* treatment to certain exhibits in this record which is to expire on the date of the Commission's Final Order in this matter unless extended by the Commission. The respondent and a number of non-party corporations have now filed requests for extension of that *in camera* coverage.[1] Some of them requested permanent extensions, others requested ten years, and still others specified no period of time.

The information held *in camera* consists mainly of sales and profit data for the years 1970–1978 as well as certain other equally old information about selling methods and product plans. In addition, respondent's income statements, accountants' reports, warranty card analysis and advertising expenses for that period of time were placed in the *in camera* record.

While the ALJ made public some *in camera* information in his Order Certifying the Record on Remand, June 27, 1980, we have found it unnecessary to use any additional *in camera* data in our Opinion. The only question before us, therefore, is whether the protected information should remain *in camera* and, if so, for how long.

Based upon our analysis of this market and the nature and especially the age of the information in question, we do not believe that the material is so secret and material to the business submitting it that "clearly defined, serious injury" is likely to result from its disclosure at this point. *H. P. Hood & Sons, Inc.,* 58 F.T.C. 1184, 1188 (1961); *General Foods Corporation,* 95 F.T.C. 352 (1980). Nonetheless, we find it appropriate to extend the *in camera* treatment for the present and permit the movants to show cause why the exhibits in question should not be placed on the public record. Therefore,

It is ordered, That the exhibits and information presently in the *in*

[1] "Respondents' Motion for Continued In Camera Treatment," October 15, 1980; Dahlberg Electronics Corp., "Request for Continuation of Confidential Status of Documents Produced Pursuant to Subpoena in Beltone Electronics Corp., Dkt. No. 8928, " July 28, 1980; Maico Hearing Instruments, Inc., "Motion for an Order Granting In Camera Treatment for Certain Exhibits," September 10, 1980; Audiotone (Lear Siegler, Inc.), untitled letter of August 14, 1980; Siemens Hearing Instruments Inc., "Motion for Continued Special In Camera Treatment for Documents Containing Non-Party Sales and Profit Data," September 22, 1980; Fidelity Electronics, Ltd., untitled letter of August 20, 1980.

camera record of this proceeding shall remain *in camera* for an indefinite interim period, and

It is further ordered, That the movants should file arguments within ten (10) days of the issuance of this order showing good cause why the *in camera* information should not be placed on the public record. If complaint counsel choose to do so, they may also file a statement on the *in camera* status of the exhibits in question within the same period of time.

IN THE MATTER OF

BELTONE ELECTRONICS CORPORATION, ET AL.

DISMISSAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8928. Complaint, May 8, 1973—Dismissal Order, July 6, 1982

This order dismisses the complaint charging a leading hearing aid manufacturer and three company officials with imposing territorial and customer restrictions, and exclusive dealing requirements upon its dealers. The Commission reversed the 1980 decision of the Administrative Law Judge, finding that Beltone's distributional practices do not adversely affect competition between manufacturers or between dealers.

Appearances

For the Commission: *Joseph S. Brownman, L. Barry Costilo, James C. Donoghue, Dennis R. Carluzzo, Paul M. Rose, Alan K. Palmer* and *Owen M. Johnson.*

For the respondents: *Elroy H. Wolff* and *Linda S. Peterson, Sidley & Austin,* Washington, D.C., *Donald A. MacKay, Sidley & Austin,* Chicago, Ill., *John J. Zel,* in-house counsel, Chicago, Ill. and *Julian R. Wilheim,* Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. 41, *et seq.*) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties identified in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues its charges as follows:

PARAGRAPH 1. Respondent Beltone Electronics Corporation (hereinafter sometimes referred to as "Beltone") is a corporation organized under the laws of the State of Illinois, with its principal office and place of business at 4201 West Victoria St., Chicago, Illinois.

Respondent Sam Posen is an individual, an officer and a director of the corporate respondent. He, with his wife, Faye Posen, is the founder and major stockholder of the corporate respondent, control-

ling, approving and authorizing acts and practices of the corporate respondent and the remaining individual respondents, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent. [2]

Respondent David H. Barnow is an individual, an officer and a stockholder of the corporate respondent. Respondent Chester K. Barnow is an individual, a director and a stockholder of the corporate respondent. They formulate, direct and control the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondent.

The individual respondents and Faye Posen own almost all of the corporate stock of the corporate respondent, which is a closely held, family corporation.

PAR. 2. Respondents are now and for some time last past have been engaged in the business of manufacturing, distributing, selling and repairing of Beltone brand hearing aids, batteries, hearing test equipment, and related articles, sometimes referred to as "Beltone products." They distribute and sell to selected retail dealers located throughout the United States, who then resell to the general public.

PAR. 3. In the course and conduct of their business, respondents ship or cause to be shipped their products from their facilities in the State of Illinois to selected retail dealers throughout the United States. There is now and has been for several years a constant and substantial flow of respondents' products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Except to the extent that competition has been restrained by reason of the practices hereinafter alleged, respondents' selected retail dealers, in the course and conduct of their business of offering for sale and selling Beltone products, are in substantial competition in commerce with one another and with dealers engaged in the offering for sale and selling of other brands of hearing aids and related products; and respondents are in substantial competition in commerce with others engaged in the manufacturing, distributing, selling and repairing of hearing aids and related products. [3]

PAR. 5. Trade and commerce in the United States in hearing aids is substantial. In 1970, the total value of shipments amounted to approximately $50 million at the manufacturers' prices, and is estimated to have exceeded $175 million at retail prices. In 1970, about fifty domestic manufacturers, domestic subsidiaries of foreign manufacturers and domestic distributors of foreign manufacturers sold approximately 510,000 hearing aids through 5,000 retail dealers who employed over 10,000 salesmen.

PAR. 6. In 1970, the top four companies in the hearing aid industry, including respondent Beltone, accounted for approximately 50% of the dollar value of shipments; the top eight companies accounted for approximately 70% of such shipments; and the top twenty companies accounted for over 90% of the industry's shipments.

PAR. 7. In 1970, respondent Beltone, which has manufactured hearing aids since 1941, had sales in excess of ten million dollars, more than any other seller of hearing aids in the United States.

PAR. 8. Hearing aids are sold by the manufacturers directly to the retail dealers, who resell the hearing aids to members of the general public. Wholesalers are rarely used in the distribution process.

Approximately 60% of the retail sales of hearing aids occur as a result of an initial, direct contact between the hearing aid dealer and the hearing handicapped, while most of the remaining sales are made after the hearing handicapped are referred to dealers by medical doctors or hearing clinics. It is the practice among medical doctors and hearing clinics, after having determined that an individual may benefit from use of a hearing aid, to recommend a hearing aid to the patient by the brand name and model, rather than by its general performance characteristics. This is done on the basis of actual tests with hearing aids which have been placed with such doctors or clinics by either the manufacturers or dealers. Then, because the doctors and clinics do not sell hearing [4]aids, the patient is referred to the hearing aid dealer in his locale who deals in the brand of hearing aid recommended. While the average price of a hearing aid to a dealer is about $100, the average retail price to the hearing handicapped is about $350. More than 50% of the persons with hearing impairment who purchase hearing aids are over 65 years of age.

PAR. 9. In the distribution and sale of their hearing aids, a number of the manufacturers of hearing aids for many years have used and pursued parallel courses of business behavior.

Among such courses of business behavior are the following:

(1) distributing and selling their hearing aids directly to selected retail dealers, refusing to deal with all other dealers;

(2) entering into agreements or understandings with their dealers, which agreements:

(a) establish territories within which the dealers may advertise and sell their products,

(b) require exclusive dealing in the manufacturers' products,

(c) assign sale or purchase quotas to be met by their dealers,

(d) encourage or require the use of the manufacturers' brand name in the dealers' trade styles,

(e) restrict the classes of customers with whom their dealers may deal,

(f) require their dealers to submit the names and addresses of their customers to the manufacturers,

(g) permit the manufacturers to terminate such agreements without cause upon thirty days notice, and [5]

(h) in the event of such termination permit the manufacturers to repurchase the terminated dealers' products purchased from such manufacturers;

(3) refusing to issue the express product warranty to consumers unless and until their dealers have reported the names and addresses of their customers to the manufacturers;

(4) encouraging or requiring their dealers to participate in cooperative advertising programs which preclude mention that the dealers offer competing brands of hearing aids for sale;

(5) engaging in extensive national brand advertising of their hearing aids;

(6) suggesting to their dealers retail prices for hearing aids which are often more than 300% above the manufacturers' prices to the dealers, with such dealers generally selling at such suggested retail prices;

(7) selling repair parts and offering repair service only to their selected dealers, refusing to sell such parts to all others, including independent repairmen or repair centers, and refusing to offer repair service to all other dealers.

The effect of the aforesaid parallel courses of business behavior has been to eliminate intra-brand and to hinder or suppress inter-brand competition in the hearing aid industry, and, further, to aggravate the unfair and anticompetitive effect of the acts and practices of the respondents as alleged in Paragraphs Ten and Eleven.

PAR. 10. In the course and conduct of their business of manufacturing, distributing, selling and repairing their products in commerce, respondents pursue the following course of action:

A. They require their selected dealers to sell Beltone products within assigned geographic territories;

B. They require their selected dealers to deal exclusively in Beltone hearing aids; [6]

C. They prohibit their dealers from dealing with certain potential customers;

D. They prevent others, not their dealers, from dealing in, or repairing Beltone products;

E. They appropriate and use for their own purposes the names and addresses of their dealers' customers.

PAR. 11. In furtherance of this course of action, respondents have been and now are engaged alone or with their dealers in the following acts and practices, among others:

(1) Respondents use agreements or understandings which

(a) require a dealer to sell Beltone products within an assigned territory;

(b) require a dealer to achieve a sales quota by selling Beltone products within that assigned territory;

(c) require a dealer to sell Beltone products only to customers found within the assigned territory;

(d) require a dealer to submit to the respondents the name and address of each customer who purchases Beltone products;

(e) condition the express product warranty on the submission of the name and address of each such customer to the respondents;

(f) require a dealer to participate in Beltone cooperative advertising and other sales promotion programs;

(g) allow for immediate termination of the contract upon dealer's violation of any provision thereof; [7]

(2) Respondents engage in extensive national advertising, such as offers of free models of a "non-operative hearing aid", whereupon they send to their selected dealers, as the so-called "leads", the names of those persons responding to such advertising who reside in such dealers' territories, prohibiting the use of such names for any purpose other than to sell Beltone products;

(3) Respondents have for many years expressed, advocated, communicated or emphasized to their selected dealers Beltone's "one-brand merchandising philosophy", meaning Beltone's business policy of advocating, persuading or pressuring its selected dealers to sell only Beltone brand of products to the exclusion of competitive brands, and have referred to such action by its dealers as "dealer loyalty", continually encouraging, praising or rewarding it;

(4) Respondents have for many years expressed, communicated, or emphasized to their selected dealers Beltone's business policy of dissuading, discouraging, or prohibiting sales of competitive brands by such dealers by means of, among others, persuasion, pressure,

harassment, coercion, or intimidation of such dealers to sell only Beltone products and not to sell other brands;

(5) Respondents refuse to sell to all but a few dealers, selected in such a manner that each of such selected dealers enjoys territorial exclusivity so that he is not in competition with any other dealer selling Beltone products;

(6) Respondents refuse to sell Beltone repair parts or to provide schematics to all dealers, or to persons engaged in the business of repairing or servicing hearing aids;

(7) Respondents refuse to supply Beltone promotional and advertising materials, price lists, hearing aid specifications or performance information to all dealers;

(8) Respondents prohibit their selected dealers from selling Beltone products to other dealers of hearing aids;

(9) Respondents require their selected dealers to use the Beltone brand name, in conjunction with a geographic identification of the dealers' locations, or otherwise, in the dealers' trade styles; [8]

(10) Respondents provide in their standard-form contract that a dealer is prohibited from doing any act, making any representation, or advertising in any manner which may adversely affect Beltone products or any other Beltone dealer;

(11) Respondents provide in their standard-form contract that Beltone has the right to terminate the contract, at any time, upon thirty days notice to the dealer;

(12) Respondents provide in said contract that in the event of termination:

(a) a dealer is required to return to the respondents the names and addresses of Beltone product users;

(b) a dealer is prohibited from using his business telephone number, and the respondents can order a transfer of telephone service under such number to a person of their choice, or order that such service be cancelled immediately;

(c) a dealer is prohibited from advertising Beltone products, new or used, or Beltone repair service;

(d) Beltone has the right to repurchase the terminated dealer's inventory of Beltone products, and

(e) Beltone is not obligated to repair any out-of-warranty Beltone products sent to it by such a dealer.

PAR. 12. The acts and practices of respondents enumerated hereinabove in Paragraphs Ten and Eleven, taken either individually or collectively, are oppressive, coercive, unfair and anticompetitive, and have the tendency and capacity of hindering, suppressing

or eliminating competition, or constitute unfair methods of competition, or unfair acts or practices, with the following effects, among others:

(1) Competition between respondents and other manufacturers of hearing aids has been hindered and suppressed; **[9]**

(2) Competition among dealers dealing in Beltone products has been eliminated;

(3) Such dealers have been deprived of their freedom to select their customers and otherwise to function as free and independent businessmen;

(4) Such dealers have been deprived of their ownership of, and freedom to maintain, confidential lists of their customers;

(5) Competition among dealers dealing in Beltone products and dealers dealing in other brands of hearing aids has been hindered and suppressed;

(6) Retail dealers of hearing aids have been deprived of their freedom to act in the best interests of the hearing-impaired public;

(7) Consumers have been deprived of their right to fair and impartial recommendations from dealers in the selection of hearing aids for the alleviation of their hearing impairment;

(8) Consumers have been deprived of the benefits of free competition;

(9) Those engaged in the repairing of servicing of hearing aids in competition with respondents have been deprived of their right to repair or service Beltone hearing aids.

PAR. 13. The aforesaid acts and practices of respondents have the tendency unduly to restrict and restrain competition and have injured, hindered, suppressed, lessened or eliminated actual or potential competition, are to the prejudice and injury of the public, and constitute unfair methods of competition in commerce and unfair acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION

BY MILES J. BROWN, ADMINISTRATIVE LAW JUDGE

SEPTEMBER 2, 1976

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint in this matter on May 8, 1973, charging respondents with unfair methods of competition in commerce and unfair acts and practices in commerce,

in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45). [2]

By answers duly filed, respondents denied that they had violated the Federal Trade Commission Act as alleged in the complaint. The three individual respondents, although admitting that they were officers, directors, or employees of the corporate respondent and that they participated in the direction and management of the corporation in accordance with applicable Illinois law and the articles of incorporation and the bylaws of the corporate respondent, denied that they were engaged in the business of manufacturing, selling, distributing or repairing of Beltone brand products.

After extensive pretrial discovery, adjudicative hearings commenced on July 15, 1974, and were concluded on November 24, 1975, after 115 days of actual trial. The Commission's case-in-chief consumed 29 trial days and respondents' answering case, which commenced on December 3, 1974, consumed the remaining 86 trial days. Hearings were held in Washington, D. C. (47 days), Chicago, Illinois (49 days), San Francisco, California (10 days) and New Orleans, Louisiana (9 days).

On January 13, 1976, the Administrative Law Judge issued an order receiving substitute documents into evidence and closing the record for receipt of evidence. On March 15, 1976, the Commission granted the Administrative Law Judge's request for an extension of time until September 3, 1976, in which to file the Initial Decision. The parties filed proposed findings on June 15 and respondents filed a reply brief on June 30.

Although many factors contributed to the inordinate time lag between Complaint and Initial Decision, the pace at which this case was to be run was set when counsel supporting the complaint were forced to move for postponement of the second phase of hearings scheduled to commence in September 1974, on the grounds that the Bureau of Competition did not have funds to bring witnesses to Washington in this matter after President Nixon vetoed the Federal Trade Commission's appropriation bill (see Order Setting Additional Dates for Adjudicative Hearings dated August 7, 1974; Motion for Continuance and Resetting of Hearings dated August 30, 1974).

Any motions appearing on the record not heretofore or hereby specifically ruled upon either directly or by the necessary effect of the conclusions in this Initial Decision are hereby denied. [3]

The proposed findings and conclusions submitted by counsel have been given careful consideration and to the extent not adopted by this decision, in the form proposed or in substance, are rejected as not supported by the evidence or as immaterial.

Attached to this decision as "Appendix A" is a 15-page tabulation entitled "Conduct of Respondents' Dealer Witnesses Re: Other Brand and Out-of-Territory Sales", a reproduction of "Appendix A" to complaint counsel's proposed findings. On review of the record citations contained therein, the Administrative Law Judge is satisfied that the information in "Appendix A" is accurate, and it is adopted as support for certain findings and conclusions contained in this Initial Decision.

Some of the abbreviations used in this decision are as follows:

CX - Commission's Exhibits
RX - Respondent's Exhibits
Compl. - Commission's complaint
Ans. - Answer of Corporate Respondent
Ans. (name) - Individual Respondent's Answer
CSCPF - Counsel supporting the complaint's proposed findings of fact, conclusions of law and order
RPF - Respondents' proposed findings
Resp. Ans. Br. - Respondents' answering brief.

Page references to the transcript of record do not have an identifying prefix (such as Tr. or R.) but are followed by the names of the witnesses if such identities are not obvious from the text of the decision.

This case focuses on the business relationship that has existed and exists between Beltone Electronics Corporation ("Beltone"), including the individual respondents, and the so-called "authorized" or "selected" dealers. In this respect the complaint alleges that respondents are engaged in the business of manufacturing, distributing, selling, and repairing hearing aids and related products in interstate commerce and that in the course and conduct of said business they pursue a course of action whereby (Compl. par. 10):

(a) They require their selected retail dealers to sell Beltone products within assigned geographic territories; [4]

(b) They require their selected dealers to deal exclusively in Beltone hearing aids;

(c) They prohibit their dealers from dealing with certain potential customers;

(d) They prevent others, not their dealers, from dealing in or repairing Beltone products; and

(e) They appropriate and use for their own purposes the names and addresses of their dealers' customers.

The principal evidence of this business relationship is contained in

the various formal written agreements between Beltone and its dealers.[1] In addition, contacts, personal or by way of written correspondence, between Beltone's employees and the dealers are important, and the testimony of both types of witness constitute the major part of the 19,000-plus paged transcript of testimony. Beltone's overall business policies are also disclosed in the testimony of its officers as well as in various documents, some being internal memoranda and some being formal manuals that are supplied to its authorized dealers. As to these evidentiary matters, the complaint alleged that in furtherance of the course of action alleged to be pursued in paragraph 10 thereof, respondents "have been and now are engaged alone or with their dealers in the following acts and practices, among others" (Compl. par. 11):

(1) Respondents use agreements or understandings which

(a) require a dealer to sell Beltone products within an assigned territory;
(b) require a dealer to achieve a sales quota by selling Beltone products within that assigned territory;
(c) require a dealer to sell Beltone products only to customers found within the assigned territory; [5]
(d) require a dealer to submit to the respondents the name and address of each customer who purchases Beltone products;
(e) condition the express product warranty on the submission of the name and address of each such customer to the respondents;
(f) require a dealer to participate in Beltone cooperative advertising and other sales promotion programs;
(g) allow for immediate termination of the contract upon dealer's violation of any provision thereof;

(2) Respondents engage in extensive national advertising, such as offers of free models of a "non-operative hearing aid", whereupon they send to their selected dealers, as the so-called "leads", the names of those persons responding to such advertising who reside in such dealers' territories, prohibiting the use of such names for any purpose other than to sell Beltone products;
(3) Respondents have for many years expressed, advocated, communicated or emphasized to their selected dealers Beltone's "one-brand merchandising philosophy", meaning Beltone's business policy of advocating, persuading or pressuring its selected dealers to

[1] Attached to this opinion as "Appendix B" is a typed reproduction of the contents of CX 401, a "Franchise Agreement" between Beltone Electronics Corporation and Hearing Aids Services, Inc., d/b/a Beltone Hearing Aid Service, Winchester, Virginia. This form of agreement was used between approximately August 1969 and June 22, 1971, and is considered to be representative of most of the agreements in effect during the period of time relevant to the issues raised in the complaint.

sell only Beltone brand of products to the exclusion of competitive brands, and have referred to such action by its dealers as "dealer loyalty", continually encouraging, praising or rewarding it;

(4) Respondents have for many years expressed, communicated, or emphasized to their selected dealers Beltone's business policy of dissuading, discouraging, or prohibiting sales of competitive brands by such dealers by means of, among others, persuasion, pressure, harassment, coercion, or intimidation of such dealers to sell only Beltone products and not to sell other brands;

(5) Respondents refuse to sell to all but a few dealers, selected in such a manner that each of such selected dealers enjoys territorial exclusivity so that he is not in competition with any other dealer selling Beltone products;

(6) Respondents refuse to sell Beltone repair parts or to provide schematics to all dealers, or to persons engaged in the business of repairing or servicing hearing aids; **[6]**

(7) Respondents refuse to supply Beltone promotional and advertising materials, price lists, hearing aid specifications of performance information to all dealers;

(8) Respondents prohibit their selected dealers from selling Beltone products to other dealers of hearing aids;

(9) Respondents require their selected dealers to use the Beltone brand name, in conjunction with a geographic identification of the dealers' locations, or otherwise, in the dealers' trade styles;

(10) Respondents provide in their standard-form contract that a dealer is prohibited from doing any act, making any representation, or advertising in any manner which may adversely affect Beltone products or any other Beltone dealer;

(11) Respondents provide in their standard-form contract that Beltone has the right to terminate the contract, at any time, upon thirty days notice to the dealer;

(12) Respondents provide in said contract that in the event of termination:

(a) a dealer is required to return to the respondents the names and addresses of Beltone product users;

(b) a dealer is prohibited from using his business telephone number and the respondents can order a transfer of telephone service under such number to a person of their choice, or order that such service be cancelled immediately;

(c) a dealer is prohibited from advertising Beltone products, new or used, or Beltone repair service;

(d) Beltone has the right to repurchase the terminated dealer's inventory of Beltone products; and

(e) Beltone is not obligated to repair any out-of-warranty Beltone products sent to it by such a dealer. [7]

The general make-up of the hearing aid industry, including some information about the major manufacturers, is contained in the testimony of the so-called industry witnesses and a Commission employee-accountant witness. Certain technical aspects of the hearing aid business were presented by audiologists, and each side presented the testimony of an expert witness who rendered an opinion about the effects on competition alleged in the complaint. Those alleged effects, or the tendency and capacity to result therein, were, among others (Compl. par. 12):

(1) Competition between respondents and other manufacturers of hearing aids has been hindered and suppressed;

(2) Competition among dealers dealing in Beltone products has been eliminated;

(3) Such dealers have been deprived of their freedom to select their customers and otherwise to function as free and independent businessmen;

(4) Such dealers have been deprived of their ownership of, and freedom to maintain, confidential lists of their customers;

(5) Competition among dealers dealing in Beltone products and dealers dealing in other brands of hearing aids has been hindered and suppressed;

(6) Retail dealers of hearing aids have been deprived of their freedom to act in the best interests of the hearing-impaired public;

(7) Consumers have been deprived of their right to fair and impartial recommendations from dealers in the selection of hearing aids for the alleviation of their hearing impairment;

(8) Consumers have been deprived of the benefits of free competition;

(9) Those engaged in the repairing [or] servicing of hearing aids in competition with respondents have been deprived of their right to repair or service Beltone hearing aids. [8]

Attached to this decision as "Appendix C" is a short glossary relating to the hearing aid industry and to Beltone's business as reflected in this record and decision.

Having reviewed the entire record in this proceeding, and having considered the demeanor of the witnesses as they testified, together with the pleadings, the proposed findings, conclusions, and arguments submitted by counsel supporting the complaint and counsel for respondents, I make the following findings of fact based on the record considered as a whole:

FINDINGS AS TO THE FACTS

About the Respondents

1. Respondent Beltone is an Illinois corporation with its principal office and place of business at 4201 West Victoria Street, Chicago, Illinois (Compl. par. 1; admitted Beltone Ans. par. 1).

2. Respondent Sam Posen ("S. Posen") is an individual, was president and is a director of Beltone (5151 C. Barnow). He is one of the founders of Beltone Hearing Aid Company, a partnership and predecessor of Beltone, and is one of the major stockholders of Beltone (Compl. par. 1; admitted Posen Ans. pars. 2, 3; 5143 C. Barnow). He is chairman of the board of directors of Beltone (6343 D. Smith). He also was one of five members of the executive committee (5042 D. Barnow).

Faye Posen ("F. Posen"), not a respondent in this proceeding, is a director, officer and major stockholder of Beltone. She holds the elected office of Secretary-Treasurer of the corporation (5152, 5154–58 C. Barnow). She is a member of Beltone's executive committee (5165 C. Barnow). She is the wife of S. Posen and the sister of respondents David H. Barnow and Chester K. Barnow (4675–76 D. Barnow).

3. Respondent David H. Barnow ("D. Barnow"), an individual, was, until his retirement on October 31, 1973 (4681 D. Barnow), a stockholder and Executive Vice President of Beltone (Compl. par. 1; admitted D. Barnow Ans. par. 5; 4673, 4683–84). Although he was never actually elected to the office of Vice President, D. Barnow held himself out to the employees of Beltone, its customers and the public as its Vice President (4833–34 D. Barnow; 5154 C. Barnow; 11956 Cato; CX 28D; CX 30A; RX 20 I). D. Barnow was a minority stockholder of Beltone, [9]having bought 1000 shares, representing about 1/16th of the outstanding shares, at about the time of incorporation. Pursuant to his stock purchase agreement, upon retirement he sold all of his shares of stock (which as a result of stock dividends totaled 3285 shares) to the corporation (4834 D. Barnow; 5155–58 C. Barnow). D. Barnow was a member of Beltone's executive committee (5042 D. Barnow). He was Beltone's chief marketing officer for over 30 years (*see* 4833–34 D. Barnow; CX 29 B).

Pursuant to a deferred compensation arrangement with Beltone, D. Barnow receives a very substantial sum of money from Beltone annually (4842 D. Barnow).

4. Respondent Chester K. Barnow ("C. Barnow") is an individual and an attorney and is a director, stockholder, and Vice President, General Manager and General Counsel of Beltone (Compl. par. 1; C.

Barnow Ans. par. 4; 5143 C. Barnow). Although he was never elected to the office of Vice President, C. Barnow held himself out to the employees of Beltone, its customers and the public as its Vice President (5154 C. Barnow; CX 28 G; CX 30 A; RX 20 I). C. Barnow is a minority stockholder, having bought 250 shares at about the time of incorporation (5155–58 C. Barnow). This represented approximately 1–½ percent of the outstanding shares and although the number of shares he owns today is approximately 800, the percentage of ownership has remained the same (5155–58 C. Barnow). He is a member of Beltone's executive committee (5042 D. Barnow). He is the younger brother of D. Barnow (4676 D. Barnow).

5. Respondents S. Posen, D. Barnow and C. Barnow, along with F. Posen, during the period of time relevant to these proceedings, owned, in the aggregate, but in differing amounts, almost 99 percent of the issued and outstanding shares of stock of respondent Beltone (Compl. par. 1; Beltone Ans. par. 9; 4683–84, 4834–37 D. Barnow; 5149, 5155–58 C. Barnow). Beltone is what is commonly described as a close corporation, with its issued and outstanding stock held, to the largest extent by the Posen family (Compl. par. 1; Beltone Ans. par. 9; 4683–84 D. Barnow; 5149, 5155, 5443 C. Barnow). The individual respondents, S. Posen, D. Barnow and C. Barnow, have, during **[10]** most of the period relevant to the allegations of the complaint, along with others,[2] participated in the direction and management of Beltone (Compl. par. 1; Beltone Ans. par. 7).

Beltone's "Board of Directors really were the supreme power and that basically was Sam and Faye Posen" (5044 D. Barnow). D. Barnow, as chief marketing officer, made policy with respect to sales and marketing and he was "in charge of and fully conversant with various Beltone activities and operations including its marketing activities and its franchising of dealers for retail selling of Beltone hearing aids and accessories" (4832–33 D. Barnow). D. Barnow was the final authority on appointing and on terminating dealers (*see* 4819–20, 4916, 4982 D. Barnow). C. Barnow is responsible for the personnel, fiscal, administrative and legal aspects of Beltone's operations and his decisions are usually final (5164–65 C. Barnow). D. Barnow, up to the time of his retirement, and C. Barnow attend all of Beltone's annual conventions of dealers and participated in every regional dealer meeting since 1960 (5251–55 C. Barnow; 4708,

[2] Larry Posen ("L. Posen"), not a respondent in this proceeding, is a minority stockholder and is the son of S. Posen and F. Posen. He is a member of Beltone's executive committee and is in charge of Beltone's manufacturing division (5167 C. Barnow). L. Posen is President of Beltone (6343 D. Smith; 11031 Mattingly; 12120 Galloway). Albert Barnow ("A. Barnow"), not a respondent in this proceeding, is Assistant Secretary-Treasurer of Beltone, having been elected to that office by its board of directors (5154 C. Barnow). He is the brother of David and Chester Barnow (5051 D. Barnow).

4882 D. Barnow). They were also responsible for the instructions to Beltone's employees as to their conduct in their contacts with Beltone dealers (4886–99 D. Barnow; 5308 C. Barnow). It is found that the individual respondents formulated, directed and controlled the acts and practices of Beltone, including the acts and practices relating to the matters alleged in the complaint.

About Commerce and Competition

6. Beltone is engaged in the manufacture and sale, at wholesale, of Beltone hearing aids, hearing aid accessories, hearing aid batteries, and hearing testing equipment, such as audiometers and Selectometers, and provides repair service of Beltone hearing aids and hearing testing equipment. Beltone sells its products, at wholesale, to retail hearing aid dealers who pursuant to agreements are authorized to sell, at retail, Beltone products to the consuming public (Compl. par. 2; Beltone Ans. pars. 10, 11). In the course and conduct of its business, Beltone ships or causes to be shipped its products [11]from Chicago, Illinois, to retail hearing aid dealers authorized to sell Beltone products, said authorized dealers located at various and sundry places in the United States outside of Illinois (Compl. par. 3; Beltone Ans. par. 12).

Beltone engages in substantial national advertising (*see* CX6 Z 56, *in camera;* CX 22 F *in camera*) and mails guarantee cards and promotional material directly to Beltone hearing aid users (4771, 4789, 4928 D. Barnow; *see* CX 28Z91–Z93, 28Z 111). Beltone employees visit Beltone dealers at the dealers' offices to give them assistance (9400 Selznick; 15803–04 Wofford, Sr.). Beltone employees and officials, including the individual respondents, regularly visit the various states to preside over and participate in frequent regional meetings, conventions and training sessions (4708, 4930 D. Barnow; 8386–88 Sauls; *see* RX 19Z13; RX 20Z4–6). Respondents are engaged "in commerce," as "commerce" is defined in the Federal Trade Commission Act, and the business practices relating to the matters alleged in the complaint, are "in commerce" within the meaning of "commerce" as set forth in the Federal Trade Commission Act.

7. Beltone is in substantial competition in commerce with others engaged in the manufacturing, distributing, selling and repairing of hearing aids and related products (Compl. par. 4; admitted Beltone Ans. par. 14).

8. The authorized Beltone dealers, in the course and conduct of offering for sale and selling Beltone products, are in substantial competition in commerce with dealers engaged in the offering for

sale and selling of other brands of hearing aids and related products (11392–93 Gorlin; 16021 Kojis; 11702–03 Lucas; *see* RPF 13).

About Beltone's Early History

9. Beltone evolved from an effort by S. Posen, a "self-taught" electronics engineer, to develop a hearing aid for Saul Decker, a salesman by trade, who was a friend of the husband of S. Posen's sister. S. Posen and Decker formed a partnership in 1939 to market hearing aids, but when it was discovered that the hearing aid developed by S. Posen would not help Decker's hearing problem, the latter sold his interest in the partnership to S. Posen, who thereafter formed a partnership with his wife F. Posen. During 1941 and 1942 she engaged in the retail sale of the hearing aid instrument that had emerged from the experiment to help Decker (4676–79 D. Barnow; 5161 C. Barnow; *see* RX 19Z19). [12]

During this period three hearing aid dealers located in Los Angeles, Detroit and Minneapolis, respectively, requested that the Posens, who were trading as Beltone Hearing Aid Company, sell to them hearing aid instruments. From this experience with hearing aid dealers, and with the assistance of D. Barnow and C. Barnow, they wrote letters to dealers, soliciting business. This solicitation resulted in about 30 additional dealers' purchasing Beltone hearing aids for resale. In July of 1943, D. Barnow was employed by the partnership as General Sales Manager. He was paid on a percentage-of-profit basis (4674–79, 4687–90 D. Barnow).

The partnership continued to solicit dealers and in a short time began national advertising in which it offered literature on the subject of hearing, and through which it obtained the names of persons showing interest in that subject. It began transmitting to the dealers, who were purchasing Beltone hearing aids, the names of those interested persons who resided in the dealer's area (4691 D. Barnow).

On October 31, 1946, the business was incorporated as Beltone Hearing Aid Company (CX 21B, *in camera*).

In 1944, S. Posen, who devoted most of his time to production and new product engineering, developed the "monopac" or "one unit hearing aid" that, in effect, reduced the size and weight of a body aid by half, an innovation that "rocked the industry." By 1946, when Beltone's competitors were "beginning to catch up", Beltone "hit them again", when it introduced its Harmony model, which, utilizing a small mercury battery that had been developed during the war, resulted in a further significant miniaturization of the body aid. Then, in about 1948, when its competitors were again catching up technologically, Beltone introduced its Symphonette model, the first

hearing aid incorporating the printed electronic circuit (*see* 4690–92 D. Barnow; CX 28 M, 28 N, 28 O).

In 1945, C. Barnow joined Beltone as its General Manager. He started on a salaried basis and upon incorporation, began receiving in addition a contingent percentage-of-profits remuneration (4682 D. Barnow; 5144–58 C. Barnow).

During this early period in its history, Beltone also acquired the services of a Ph. D. audiologist to help in the [13]training of Beltone hearing aid dealers and in the preparation of Beltone's technical manuals or any technical material sent to professionals or to consumers. It also hired a training director to make available to Beltone dealers knowledge and skills in fitting hearing aids. It also hired personnel to provide assistance to dealers in how to manage their businesses (*see* 4693–94 D. Barnow).

In 1947, Beltone developed the Selectometer, or master hearing aid, from which a dealer could ascertain the particular Beltone hearing aid that could be used to fit a person with a hearing loss, thus permitting the dealer to order only the needed instrument and eliminating the necessity for the dealer to maintain a sizeable inventory (*see* 4715, 4729–32, 5012 D. Barnow).

In about 1944, Beltone's dealer in Kansas City requested a written dealer agreement, ostensibly to document the fact that he was the authorized dealer in that community, in order to capitalize on the "Beltone" name, which, as the result of national advertising, "meant something" (4696 D. Barnow). Beltone supplied this dealer with an individually typed agreement drafted by an attorney and followed this individualized approach with dealers until the requests became too numerous whereupon it drafted a uniform agreement and had it printed (5169 C. Barnow).[3]

As a result of imaginative product innovation, its methods of sales promotion through a national advertising and lead program, and distribution through dealers, Beltone, by the 1950s, had emerged as one of the leaders in the hearing aid industry.

About the Prior FTC Proceeding Against Beltone

10. In 1956, the Federal Trade Commission, adjudicated a complaint that had been issued November 2, 1950, alleging violations of Section 3 of the Clayton Act, and concluded, on [14]the basis of the terms of the dealer agreements and other facts of record, that the acts and practices of Beltone in selling and making contracts for

[3] The record contains eight different forms of so-called "dealer agreement" used by Beltone from 1949 to the time of the hearings. The 1949–50 agreement, which granted the dealer an "exclusive franchise," (*see* CX 576; RX 58D, 59) was slightly modified by the middle of 1953 (CX 577, 436C, 552, 440, 558; RX 58, 578, 76, 66). Citations are arranged by date, i.e. CX 577 executed February 20, 1953, RX 66 executed June 19, 1956.

the sale of hearing aids on the condition, agreement or understanding that the purchasers thereof shall not sell or deal in similar products of a competitor or competitors, constituted a violaton of Section 3 of the Clayton Act. The Commission issued an order requiring Beltone, its officers, agents, representatives and employees, to cease and desist from:

1. Selling or making any contract or agreement for the sale of any [hearing aids or other similar or related products] on the condition, agreement or understanding that the purchaser thereof shall not use, deal in, or sell hearing aids or other similar or related products supplied by any competitor or competitors of respondent.

2. Enforcing or continuing in operation or effect any condition, agreement or understanding in, or in connection with, any existing contract for sale, which condition, agreement or understanding is to the effect that the purchaser of said products shall not use or deal in hearing aids or other similar or related products supplied by any competitor or competitors of respondent [52 F.T.C. 830 (1956)].

After negotiations with the Division of Compliance, Federal Trade Commission (*see* RX 22, 23, 24, 25, 26, 27, 28, 29, 30), Beltone sent a letter to each of its dealers enclosing an amended form of agreement as appropriate in the circumstances.[4] The covering letter, after referring to the Federal Trade Commission proceeding requiring the cancellation of exclusive-dealing franchises, contained [15]the following language (RX 34 Rice and B. C. Kent):

Accordingly, your present Franchise must be changed. To replace it I'm enclosing two copies of a new Franchise Agreement which has already been submitted to the FTC in compliance with their order.

I would like to take a moment or two . . . to explain the meaning of this non-exclusive arrangement. According to our attorney it means you no longer are *required* to deal exclusively with us. I've underlined the word "required" because that's the essence of the change in the new arrangement. You aren't required to deal exclusively with us but if you feel it's in the long-range best interest to you and your customers then you will *want* to continue to handle only the Beltone line. And even though we're not required to deal exclusively with you in your territory, we *prefer* to continue to deal with you exclusively as our distributor in your territory.

Why? Because it has always been, and still is our philosophy that single line merchandising in the hearing aid business is in the best interest of the public, the dealer, and the manufacturer. We are confident that you and all other Beltone distributors will voluntarily desire to handle only the Beltone line.

* * * * * * *

We sincerely believe that this new Franchise Agreement will in no way disturb the

[4] Three forms, substantively the same, were used. Form "A" went to all new distributors and old distributors who had never signed an agreement (Listed chronologically: CX 536 (February 1, 1960) RX 96, 81, CX 400, RX 75, CX 410, 420, RX 77B, CX 411, 405, 429, 408, 402 (March 17, 1965)). Form "B" went to all distributors who had agreements which did not include the "Appendix A" assignments. (Listed chronologically: CX 431 (February 11, 1957), 432, 440D; RX 61; CX 421, 523 (March 12, 1957)). Form "C" went to all distributors who had previously signed an "Appendix A" assignment form. (Listed chronologically: RX 72 (February 11, 1957), 68; CX 551; RX 76F, 58F; CX 436; RX 32; CX 559; RX 73 (September 29, 1959); *see also* RX 29).

long-standing, mutually successful business relationship between us . . . . We pledge to continue and intensify, and we have in fact intensified our national advertising dominance to produce the greatest number of leads, our unexcelled engineering, design, production, and quality, local advertising and sales helps, aid in recruiting and training consultants, and the many, many other Beltone services you're familiar with. [16]These basic policies have been responsible not only for Beltone's growth to its position of leadership in the industry but also for the welfare and prosperity of Beltone distributors.

Working together in the future as we have in the past we can look forward to an even greater era of prosperity and happiness for all of us in the Beltone family. [Emphasis Beltone's.]

On April 1, 1957, the Commission sent a letter to Beltone (RX 30):

The Commission is in receipt of your latest letter dated March 7, 1957, enclosing the final drafts of your new Franchise Agreement and covering letter, which have been filed by you and your counsel as a report showing the manner of compliance with the Commission's order of February 16, 1956.

On the basis of the information furnished by you and your counsel, it appears that you are presently in compliance with the order and your report, accordingly, has been received and filed.

11. By June 1965, Beltone had a different form agreement that was being used in place of the three 1957 forms (A, B, and C). The 1965 form was used until late 1969,[5] when it was again modified. Finally in about June 1971, the agreement was further modified and that 1971 form appears to be the agreement presently used.[6]

Except for the 1957 change, Beltone did not enter into a new agreement with each of its authorized dealers [17]everytime it changed the form itself. The then-current form was used when a new agreement was executed whether occuring at the outset of a dealership, or due to a change of business status such as an individual proprietorship's becoming a corporation, or to a significant change of the described "territory" or "area of primary marketing responsibility" of a dealer. Accordingly, at the time of hearing there were in effect agreements representing each form issued since 1957.

In any subsequent discussion of the terms and provisions of the agreements and Beltone's relationship with its authorized dealers generally, the so-called 1969 form will be used as the model and its language quoted.[7] When deemed appropriate references will be made to the other forms of dealer agreement.

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[5] Listed chronologically: CX 427, (June 7, 1965), 428, 586, 426, 425; RX 65; CX 615, 616, 439, 513, 599, 595, 585, 434E; RX 11, 1; CX 587, 423, 557, 563, 560, 406, 404, 570 (February 4, 1969).

[6] Specimen CX 398. Listed chronologically: RX 64, 71; CX 581; RX 81I, 78; CX 598.

[7] Listed chronologically: CX 401 (August 18, 1969), CX 525, 407; RX81D; CX 521, 566, 434, 553, 580, 449, 526, 571, 538, 544, 565 (June 22, 1971).

About the Hearing Aid Industry

12. The hearing aid industry consists generally of domestic manufacturers, domestic subsidiaries of foreign manufacturers and domestic distributors of foreign manufacturers, totalling approximately 50 in number (3915 Harrison; 16004 Kojis; 4086–88 Skadegard). About eighteen of these are members of Hearing Aid Industry Conference, Inc. ("HAIC"). Other members of HAIC include suppliers of hearing aid components and such accessories as batteries (15998–16004 Kojis).

One of the purposes of HAIC is to compile and publish certain industry statistics. A member's dues depend, in part, upon the number of hearing aids it sells (3972 *et seq.* Stutz). In order to insure the confidentiality of an individual member's sales figures, the reporting of such information is made to Price Waterhouse Company and only total figures are made available (4125 Skadegard).

In the November 1972 issue of the Hearing Aid Journal the following information was published (CX 1B):

Volume Sales in the United States

Units Produced in U.S. & Units Imported into U.S. from July 1, 1971 to July 1, 1972 - 595,318. This represents an increase of 8.47% over the same period of the previous year. [18]

Units for the Years

1970 – 510,747
1971 – 576,301

A comparison of the yearly totals show that units sold in 1971 increased 12.8% over 1970; whereas the increase in 1970 over 1969 was only 8.4%.

Hearing Aid Wearers	–	2,328,571
Hard of Hearing Persons (not using Hearing Aids)	–	7,760,000

Where does the average hearing aid dealer get his sales:

Referred by Otologists (M.D.'s)	11.3%
Referred by Hearing Centers (Clinics)	14.5%
Customers who have not previously consulted either an otologist or clinic	68.9%
From Some Government Agency	5.3%

Sales of Types of Models	
Behind-the-Ear Models (of which 1.85% were CROS[8] or Bi CROS	63.4%
Eye Glass Aids (of which 15.5% were CROS or Bi CROS)	22.9%
Conventional (Body) Aids	9.4%
All-in-the-Ear Aids	4.3%
Number of Years Average hearing aid wearer trades for newer model	3.4 years.

In response to certain questionnaires requiring reports pursuant to Section 6(b) of the Federal Trade Commission Act, eleven domestic manufacturers of hearing aids submitted to the Commission totals of their unit and dollar sales of hearing aids for the year 1970. In preparation for this case, counsel supporting the complaint requested permission of each of these manufacturers to make such information, which had been obtained on a promise of confidentiality, available to [19]respondents' counsel as underlying material for computations relating to the degree of concentration in the hearing aid industry. Three manufacturers refused such permission (*see* RX 13, 14, 15, 16, 17, 18 (*in camera*)).

Computations were made on the basis of sales information relating to the seven nonobjecting manufacturers and Beltone. To compute the "total industry in dollars" an average price per unit ($103.97) was computed from the eight manufacturers' data and multiplied by the total industry (HAIC) units (510,747), resulting in a total

[8] Contralateral-routing-of-offside-signals (*see* CX 21C (*in camera*)).

industry in dollars $53,107,473. (CX 18, *in camera;* 3578–3582 Peck, *in camera*).[9]

The tabulation also shows that the first four companies considered for CX 18 accounted for 45.1% of the shipments expressed in units and 47.4% of the shipments expressed in dollars. Similarly, the tabulation shows that the eight companies accounted for 64.4% of shipments expressed in units and 64.4% of shipments expressed in dollars. Beltone, the largest manufacturer in terms of shipments in units (95,887) and dollars ($10,976,852) had computed market shares of 18.8% expressed in units and 20.7% expressed in dollars.

Commission counsel also presented a similar tabulation based on "total industry in units" (460,037) and on "total industry in dollars" ($45,016,497) as reported in Annual Survey of Manufacturers in 1971 (CX 19, *in camera*). The resulting statistics show an average price per unit of $97.85, market shares for the first four companies of 50% expressed in units and 55.9% expressed in dollars, and market shares for the eight reporting companies of 71.4% expressed in units and 75.9% expressed in dollars. Beltone's share of the market was 18.8% (units) and 20.7% (dollars) (CX 19, *in camera*).[9]

These tabulations show that, in 1970, the total value of shipments of hearing aids amounted to approximately $50 million. Four of the top companies in the hearing aid industry, including Beltone, accounted for approximately 50% of the dollar value of shipments; and eight of the top companies, including Beltone, accounted for approximately 70% of such shipments. Trade and commerce in the United States in hearing aids is substantial. **[20]**

13. Hearing aids are sold by the manufacturers directly to retail dealers, who in turn resell hearing aids to members of the general public (Compl. par. 8; Beltone Ans. par. 19; 4764–65 D. Barnow; 3717–20 Saad; 15990 *et seq.* Kojis; 3910–45 Skadegard; 4236 Sturtz). There are more than 5000 hearing aid dealers in the United States, and these dealers employ approximately 10,000 salesmen or "consultants" (4257 Sturtz; 4761 D. Barnow).[10]

There are approximately 500 natural shopping areas in the United States, and the goal of the manufacturer is to have at least one dealer selling its products in each of these markets (*see* 14445 Winslow).

Most of the states have licensing laws convering the qualifications of dealers and regulating, to some extent, the dispensing of hearing

[9] On the date of this Initial Decision the *in camera* status of CX 18 and 19 is removed (*see* 3614 ALJ).

[9] On the date of this Initial Decision the *in camera* status of CX 18 and 19 is removed (*see* 3614 ALJ).

[10] But *see* RX 85, wherein it is reported by the Hearing Aid Journal that there are only a total of 5700 *dealers and consultants* (*see also* 4064 Skadegard).

aids. Notable exceptions (as of 1974–75) were Illinois (18137 Osnowitz), New York (12093 Galloway) and Pennsylvania (12093 Galloway).

Most dealers carry one major line of hearing aids and, to different degrees, supplement the line with one or two other brands (*see* 4114–15 Skadegard). Among the "major brands" in the United States are Beltone, Dahlberg, Zenith, Maico, Radioear, Qualitone, Sonotone and Audivox whereas such brands as Acousticon, Otarion, Telex, Audiotone, Vanco and Electone may generally be considered secondary lines (*see* 3972 Harrison; 15992–93 Kojis). Significantly, some aids of foreign manufacturers are also considered to be secondary brands, foremost of which are Oticon, Norelco, Siemens and Danavox (*see* CX 6Z112–133, *in camera*).[11] However, some dealers, including most Beltone dealers, are single-line dealers, carrying the line of only one manufacturer (16835 Carver; 16653 Harris; 3781 Saad).

14. There are several distinct ways in which manufacturers attempt to stimulate the retail sale of their hearing aids. Foremost is a program of national advertising designed to procure "leads", *i.e.*, the names and addresses of prospects who might be helped by hearing aids. A "lead" is transmitted [21]to the hearing aid dealer who attempts to sell a hearing aid to the "lead". In many cases contact is made in the home of the prospect. Beltone emphasizes this approach, and has since the 1940's (*see* 4739 D. Barnow).

Some manufacturers do direct mail advertising to hearing aid users and prospects, in effect explaining the features and merits of their products (*see* CX 6Z16, *in camera*).

In addition, many dealers themselves engage in extensive advertising or promotional activities designed to identify "leads". Many contacts arise from satisfied customers' referring prospects to the dealer, and many sales are repeat sales to users who desire to upgrade the quality of their hearing aids (CX 1B; 11564 Ugoretz).

More than 60 percent of the retail sales of hearing aids occur as a result of an initial, direct contact between the hearing aid dealer (or his consultants) and the hearing handicapped (*see* CX 1B).

Most of the remaining sales are made after the hearing handicapped are referred to dealers by medical doctors or hearing clinics. It is the practice among many audiologists and hearing clinics, after having determined through audiological testing that a person may benefit from use of a hearing aid, to actually select an aid or aids from their sample stock on hand (which has been supplied to them by manufacturers or dealers) and determine by putting the aids on the patient which aid performs best on the particular individual.

[11] It is estimated that Siemens, Norelco and Oticon are the three largest manufacturers of hearing aids in the world (*see* CX 6Z112, *in camera*).

They then recommend the aid to the patient by the brand name and model and, because the doctors or clinics do not sell hearing aids, the patient is referred to the hearing aid dealer in the patient's locale who deals in the brand of hearing aid recommended (16787, 16800 Carver; 3800, 3821 Harrison). Some clinics prescribe a fitting by general performance characteristics and refer the patient to the dealers (usually designating two or three dealers) who will chose the appropriate aid from the line or lines that they carry (16030–31 Kojis).

Some manufacturers concentrate their marketing activities in contacting the audiologists and attempting to pursuade them to carry their aids in stock and to use them in trial fittings, hoping that the audiologists will prescribe their aids (*see* CX6Z10–Z27, *in camera*).

15. In 1970 the average wholesale price of a hearing instrument to the hearing aid dealer was about $100. It is [22]estimated that the average retail price to the hearing handicapped was $350 at that time (3937 Skadegard). Since then, there have been significant improvements in hearing aids, and the wholesale cost and retail price have increased to approximately $150 and $475, respectively (*see* 16085 Kojis). Significantly, the retail price is generally three times the wholesale cost, a mark-up which reflects, in general, the dealer's cost of doing business (*see* 3940 Skadegard; 14469 Winslow). One of the most important features of a hearing aid, competitively speaking, is its cosmetic appeal, and the principle element of the "cosmetics" of a hearing aid is miniaturization (*see* 16417, 16432 Metcalfe).

The most important factor in the retailing of hearing aids is in the ongoing service supplied by the dealer to his customer/user after the initial fitting (*see* 28Z197). A hearing aid is a sensitive electronic instrument that is fit pretty much according to the subjective response of the user himself (16625, 16700 Harris; 13893, 13904–05 Burak). In addition, ear molds and tubing may need modification, replacement or servicing, and replacement batteries must be available. That this post-fitting service is important is made more clear when it is considered that the vast majority of persons with hearing impairment are over 60 years of age, and the next largest single age group appears to be the very young (3830 Harrison; 16827 Carver; 16028 Kojis).

About Beltone HOFEs and Beltone Dealers

16. Beltone sells hearing aids and accessories at wholesale to its authorized dealers located in the United States and Canada. Such sales constitute 99 percent of its sales of hearing aids. Its authorized

dealers are those dealers who have signed either Beltone's "dealer agreement" or its "franchise agreement". In addition, Beltone now has about 22 authorized audiometer dealers located in the United States and Canada, and these dealers sell audiometers at retail (6038, 6091 D. Smith). Other sales of hearing aids, consisting of not more than 1 percent of the total, are to Beltone's international dealers pursuant to an "international" agreement (CX 441–448). At one time Beltone sold to the United States Government for distribution through the auspices of the Veterans Administration.[12] Beltone makes no retail sales and does not sell to anyone who is not an authorized dealer (5087 D. Barnow; 6330 D. Smith; CX 184, 162). [23]

At all times relevant to the issues raised in the complaint there have been, at any one time, approximately 370 authorized dealers located in the United States with approximately 30 additional authorized dealers located in Canada (6327 D. Smith, *see also* CX 141).

Approximately 15 to 20 dealerships are terminated every year; 12–15 of these terminations are initiated by Beltone (6328 D. Smith).

The record in this proceeding consists in large part of the testimony of approximately 90 persons who had been or were, authorized Beltone dealers. Complaint counsel called 22 ex-Beltone dealer witnesses, most of whom were engaged in retail hearing aid businesses. Respondents presented the testimony of 70 witnesses who were presently or had been Beltone authorized dealers. Several of these dealer witnesses had also been employees of Beltone, Ben Wofford, Sr., having been Beltone's National Field Sales Manager from 1958 through 1965 (15735 Wofford, Sr.).

17. The Beltone employees who call upon the Beltone authorized dealers at the dealers' places of business are called Home Office Field Executives ("HOFEs"). These HOFEs are either District Managers, Regional Managers or Division Managers. District Managers are actually employees in training to become Regional Managers.

Each Regional Manager has responsibility for about 30 to 35 authorized dealers who are located in a geographic region. The HOFEs have no offices in the field, and all correspondence originating with them is typed and mailed by the home office (6436 N. Smith; *see* RX 19Z; 20U (back)).

At the present time there are approximately 13 regions covering the United States and Canada. In 1970 there were ten regions covering the same area (*see* CX 141).

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[12] At the time of hearings, Beltone was not selling hearing aids to the Veterans Administration (3265 Causey).

The Regional Managers and District Managers are under the supervision of Division Managers. There are presently two Division Managers (7071 Westmoreland). The Division Managers have offices in Chicago. All of the HOFEs are under the supervision of a National Field Sales Manager who in turn is under the supervision of the Director of Marketing (7071 Westmoreland; *see* RX 19Z30–Z34). **[24]**

Beltone has carefully delineated the duties of its HOFEs (*see* RX 19Z36; 5070 D. Barnow). For example, these HOFEs are prohibited from taking orders for Beltone products and are prohibited from receiving payment for products purchased from Beltone by authorized dealers (4706 D. Barnow; RX 19Z65).

The HOFEs' principal duties relate to the assistance that Beltone gives its authorized dealers mainly in the area of training dealers and consultants in technical matters and sales techniques (*see* RX 19Z36). In addition the HOFEs are responsible for assisting dealers in the promotion of Beltone products and implementation of programs relating to the hiring of salesmen (8671 Sivek; 10072–73 Wofford, Jr.). HOFEs are also responsible for inducting the dealer at the beginning of his dealership.

Almost all of Beltone's HOFEs either were recruited from the ranks of dealers' consultants or were Beltone dealers themselves before joining the employ of Beltone (5096 D. Barnow).

Regional Managers are also responsible for making initial recommendations on applications for dealerships and for termination of dealerships.

Three times a year the HOFEs are required to attend HOFE meetings in Chicago where the home office personnel have an opportunity to discuss Beltone business with them as a group (*see* 5111–12 D. Barnow; 7010 Westmoreland). At such meetings Beltone's business policies, such as what HOFEs can and cannot do, are stated and restated. In effect, the HOFEs are told that they cannot do anything that could be inferred as requiring that a dealer handle only Beltone or that would prohibit a dealer from buying and selling a competitive brand of hearing aid (*see* 19Z58; 7012–16 Westmoreland; 8700 Sivek).

Moreover, they are told that they cannot do anything that could be inferred as requiring the dealer to sell in any particular place or prohibit the dealer from selling outside his area of primary marketing responsibility (*see* RX 20W; 7012–16 Westmoreland).

HOFEs are also instructed that they cannot discuss the retail price at which a dealer resells his products and they cannot tell a dealer to whom he must sell his Beltone products (*see* RX 19Z61–62; 7053–54 Westmoreland; 8700 Sivek). **[25]**

The HOFEs are instructed, however, if the subject is brought up, that single-line merchandising, in Beltone's view, is in the best interest of the dealer, the manufacturer and the user, that a dealer is responsible to service users to whom he sells, that all users should be afforded the best service, including service on Beltone's guarantee, and that price gorging should be avoided (*see* RX 19Z59–Z64; RX 20W; *see* 8736–37 Sivek; 6395–96 D. Smith; 8465 Sauls).

> Dealers, from time to time, will say to me, as they do to other Beltone employees, one reason or another they are selling competing lines. And we discussed with them very openly the good business reasons why we feel it might not be in the best interest of the hard of hearing persons, themselves and Beltone; but we very carefully and always remind them that it is their legal right as an independent businessman to sell anything they wanted to, as many competing brands they want to, and anyplace they want to at any time.

[6395 D. Smith].

Whenever termination of a dealer is contemplated the HOFEs are instructed that grounds for such termination can never be the fact that the dealer is selling competing brands of hearing aids, or selling hearing aids outside his area of primary marketing responsibility. Permissible grounds for termination are "inadequate market penetration" after all attempts have been made to try to help the dealer through suggested programs such as hiring additional manpower and obtaining additional leads (*see* 19Z58–Z62).

18. As a general rule Beltone dealers are selected from the ranks of employees of existing Beltone dealers. These are Beltone consultants, people who have worked with Beltone dealers for one or as many as five years or even more, or a competitive hearing aid dealer or a competitive consultant (6130–31 D. Smith). Some dealers, before appointment, had been engaged in businesses outside the hearing aid industry, but most of them became Beltone dealers prior to 1960.

All authorized dealers are aware of Beltone's desire to identify persons who, in Beltone's view, are prospective dealers, and the possibility of becoming a Beltone dealer is used by the dealers to recruit employees. Beltone has **[26]**a policy, however, of not appointing a dealer's employee as a dealer unless the dealer makes a recommendation (6131 D. Smith; 7073 Westmoreland). If a dealer's employee is appointed as a dealer in an area other than his employer's area, Beltone will compensate the dealer in the amount of $400 to defray the expense of hiring and training a replacement (*see* CX 28Z186; 17051 Allen; 11486 Gorlin; 12611 Hood; 12389–90 Johnson; 15876 Azar).

19. When Beltone's field personnel identified a person whom they considered to be qualified, the applicant was requested to fill

out various personnel and financial information forms and was required to go to Chicago for interviewing at the Beltone plant. Beltone's general procedure was to have the applicant talk to the various heads of the different departments and be interviewed by a "screening committee" to ascertain whether his or her personal profile indicated he or she was the type of person who could succeed in a business (6131–36 D. Smith). In addition, Beltone's policy was to discuss with the applicants in probably general terms the rights and obligations of a Beltone dealer, along with Beltone's single-line philosophy, and Beltone's manner of doing business as set forth in the dealer agreement (*see* 6134, 6400 D. Smith). Some of the points that dealers recalled about this trip to Chicago was Beltone's "lead" procurement program (17375 Beattie; 11256 McCurdy), and the necessity that the dealer hire employees (consultants) to enable his dealership to call on these "leads" (2158-60 Benoit; 12992 Harlow; 11014 Mattingly). Other points of interest were the "potential" assigned to the dealer's area of primary marketing responsibility (1126 Sable; 3122 Stephen), and the dealers' service responsibilities to the Beltone users (14034 Culver; 15018 Pierson). In addition, the areas that were available and the applicant's choice of area was discussed (17033 Allen; 15246 Byron).

Following the Chicago interview, the applicant was advised, usually by the Beltone field man or by his dealer-employer, as to whether he had been approved by Beltone to be an authorized dealer. Usually the Beltone field executive in the region where the dealership was to be established arranged to meet the applicant at the place of the dealership (7076 Westmoreland).

This meeting, usually covering several days and maybe a week if the applicant had never been in business before, was the "induction" process. Beltone had "a formal induction process, a list of about 50 different chores that a regional [27]manager is responsible for doing to help a dealer become installed. And one of these things is reading through the entire franchise with the man to make sure he understands it" (6139–40 D. Smith).

> Even if you take a man who has been in our business for several years and he goes to a strange city and attempts to open a business, it many times is overwhelming to him and there is so many things to get done if he is to start a business off in an organized fashion and become successful that we felt like it was necessary to record all of these things and furnish them to the regional manager.
>
> These chores . . . include everything from in some cases helping him find a location, to helping him hire his office girl, setting up bookkeeping procedures, and finding insurance companies that can take care of his needs . . .
>
> [6140 D. Smith].

After the HOFE had gone over the dealer agreement form in detail the applicant signed it, and the agreement was then sent to the Beltone factory and countersigned, an executed copy being sent to the applicant-dealer (*see* 6984 Westmoreland; 8677 Sivek).

20. During the induction or shortly thereafter, Beltone supplied the new dealer with a list of all users and prospects in the dealer's area of primary marketing responsibility, as contained in Beltone's computer (8916–20 Sivek). In addition Beltone would send to these users what is referred to as a "Dear Friend" letter signed by Sam Posen, whereby Beltone announced the appointment of the "new, local authorized Beltone dealer" and advising[13] that "he is the *only* authorized dealer in your area" (Emphasis Beltone's) (CX 175; *see also* CX 176, 177B, 178, 179A, 180A, 208, 360, 390, 450; 8834 Sivek). In the event the new dealer had never been in the hearing aid business before, the HOFE [28]would also train him in the aspects of selling hearing aids, although with the advent of state licensing, the appointment of an untrained person as a dealer was a rare occurrence.

21. During this induction or shortly thereafter Beltone would begin to supply the new dealer with "leads", the names of persons who had responded to Beltone's national advertising. Along with the names Beltone also supplied the dealer with the material or non-working model of a hearing aid which the person had requested (*see* CX 28Z51). The dealer sent the material requested to the "lead" and shortly thereafter he or his consultant made a personal call upon that "lead" in order to sell the person a hearing aid (*see* 7293–96 Westmoreland).

On this call, or where the prospect came to the office, the dealer or consultant had an audiometer and a Beltone binaural Selectometer (*see* CX 28Z96). By these instruments he was able to test a prospect's hearing and determine the degree and type of hearing loss, if any, involved. By use of the Selectometer he can determine the hearing aid in the Beltone line suitable as to frequency and power to help the hard of hearing person (4766–67 D. Barnow; *see* CX 522). Upon making a sale of an instrument requiring an ear mold fitting, the salesperson would make an ear impression so that an ear mold could be made on special order from an ear mold laboratory (CX 28Z101). Beltone does not manufacture ear molds (*ibid.*) The dealer than orders the hearing aid from Beltone. Some dealers did carry a stock of hearing aids (7287 Westmoreland). On calls made on Beltone "leads" the dealer was required to report to Beltone on a form

[13] In some "Dear Friend" letters the user is advised that the former dealer is "no longer the authorized Beltone Dealer in your area" (*see* CX 176, 208, 395) or has retired from the business (*see* CX 177B).

supplied for that purpose the results of the call (CX 28Z106–107, *see* CX 574–75). The dealer cannot use the Beltone "lead" for any purpose other than selling a Beltone hearing aid (CX 28Z107; CX 401, Art. 4; CX 487).

22. As part of Beltone's training and instruction of its dealers and the dealer's consultants it emphasizes the use of the "PAQ" presentation when the consultant calls on prospects in their homes. This procedure is set forth in the Beltone consultant's manual (*see* CX 522; *see also* RX 20Z5–Z6), the introduction to which reads as follows (CX 522 at p. 11): **[29]**

"PAQ" is a *planned* sales presentation—not a canned one. This successful system has been developed and refined through many years of successful selling by Beltone Dealers, consultants, members of the Beltone Field Sales Department and Home Office personnel. It represents the best thinking of all these people and is the system taught by Beltone in field sales training schools and at the National Sales Training Center. It is your framework for success in selling Beltones and for doing the greatest service for every hard of hearing person.

PAQ stands for the following:

P. PROBLEM BUILDING

In every successful sale a problem must be built. Unless your prospect has a problem and acknowledges it, he does not need nor desire any help. His problems must be clearly established.

A. AWARENESS OF THE SERIOUSNESS OF THE PROBLEM

It is not enough to just build the problem. Your prospect must be made aware of how serious the problem is. To delay the solution to the problem may be robbing him of many years of more enjoyable living. You must create, in your prospect's mind, real concern about his ability to function as a normal human being with his present hearing problem. He must be realistically informed of the dangers of postponing taking a step for better hearing.

Q. QUALIFY AS AN EXPERT

After the problem has been built and the prospect is aware of the seriousness of the problem, you must establish beyond any doubt that *you* are the person most qualified to help him with his problem [Emphasis in original].

23. Beltone supplies a complete training program for consultants and dealers (4749–52 D. Barnow). The dealer is supplied with a complete array of training materials **[30]**including films, manuals, and records (*see* CX 28Z58; CX 522). In addition the HOFEs stand ready to conduct training sessions at the dealer's office. In addition HOFEs will conduct training sessions at certain locations in their regions (CX 28Z183). Beltone also conducts a National Sales Training Center for new dealers and experienced consultants (*ibid.*).

HOFEs were instructed "to plan to go out and help these dealers who were having trouble achieving market penetration" (6112–13 D. Smith).

When the hearing aid ordered by the dealer is received from Beltone, the dealer calls on the purchaser, or the purchaser comes to the office, and the dealer fits the instrument or instruments and ear molds if they are required.

According to Beltone's service plan, the dealer is required to service this Beltone user at regular intervals thereafter (*see* 18302 Laster). The first followup call is made in approximately 30 days to make sure the user is getting the best use of his instrument (*see* 12170, 12184–85 Galloway; 14707–8 Bruner).

24. Beltone also requires the dealer, upon making delivery of the hearing aid, to send to Beltone a guarantee registration card (*see* CX 28Z91–Z93). The dealers are obligated by the dealer agreement (CX 401, Art. 5) to follow this procedure and they invariably do. The user will not receive his factory one-year warranty on the Beltone hearing aid unless the dealer registers it with Beltone (*see* CX 572). In addition the guarantee registration card must be filed within 120 days (plus 30-day grace period) from the date the instrument is sold by Beltone or the guarantee will not be issued (*see* CX 28Z91; 7282–83 Westmoreland). The dealers understand the reason why they are to do the registering is because the purchasers, who are usually persons over 60 years of age will not sent them in, and some testified that this procedure was also to insure that the instrument was a new instrument (*see* 13384 Scheutzow; 15775 Wofford, Sr.; 17386 Beattie).

25. Every Beltone dealer "from the day [he is] considered for a dealer agreement" is given a "potential" for his area of primary marketing responsibility (6101 D. Smith). This potential, expressed in terms of units of new Beltone hearing aids ordered per month from Beltone is, according to Beltone, figured on such statistics as population, age of population, economic conditions in the area, etc. (*see* CX 28Z83). It is considered to be a normal, achievable [31]goal which the dealer attempts to achieve in his area of primary marketing responsibility, as per dealership agreement (7179 Westmoreland). Between various dealers, it provides a standard of comparison as to how well the dealers are progressing, their performance being expressed in percentage of potential achieved (6098–99 D. Smith). In effect, each geographic subdivision in an area of primary marketing responsibility, such as county, postal zone, etc., is given a "potential" (6098, 6102 D. Smith).

26. Dealers are encouraged to prospect for their own leads (*see* CX 28Z110; CX 522). In this respect, Beltone has a cooperative advertising plan based on the dealer's purchases of new Beltone hearing aids, a credit of $7.50 being given for each such instrument

purchased (CX 28Z118). Local advertising by the dealer, if approved by Beltone, will receive credit of up to 50 percent (CX 28Z117).[14] In certain metropolitan areas, for example, the Los Angeles area, dealers have formed "METRO" groups in order to take advantage of Beltone advertising in city-wide media (*see* CX 140). Any advertisement that mentions a "product competitive to those manufactured by Beltone" is not eligible for advertising credit (CX 28Z128). Beltone also encourages and gives cooperative advertising credit to dealers participating in fairs or other similar shows or events whereby leads may be prospected (CX 28Z126, Z145–52). The dealers usually turn over the leads so developed for prospects residing outside their area of primary marketing responsibility to either Beltone, or the dealers located in the other areas (9185 Bain; 14069, 14107 Culver).

27. All of Beltone authorized dealers are provided with a list of all other Beltone dealers as well as their respective areas of primary responsibility (*see* 13010 Harlow).

28. Every month Beltone compiles certain statistical information relative to each Beltone authorized dealer on a so-called "Beltone Dealer Progress Report" (8904 Sivek).[15] In brief, the compilation reports the dealers' purchases of new hearing aids, their potential, and purchases in terms of percent of potential. In addition, it reports these sales as three month averages, and also reports past years' sales. Also the number of Beltone leads and a lead purchase ratio is reported, as well, and the number of inquiry result reports returned by the dealers. The number of guaranty registration cards is set forth and until 1973, the number of binaural sales were listed. The number of complaints and a complaint purchase ratio is also reported (*see* 6103–04 D. Smith; CX 28Z84–Z88). **[32]**

29. The retail prices at which new Beltone hearing aids are sold is set by the authorized dealers. Although Beltone had issued suggested retail prices sometime during the 1950s (*see* 14551 Langham; 12799 Keel), it hasn't had such suggested retail prices since then. The dealers testified that they determined their retail price on such factors as the wholesale price of the instrument, the cost of accesories, the salesman's commission or salary, overhead of the operation of the business, including service centers and branch offices, and the cost of servicing all of the users-customers, as well as a reasonable profit (*see* 18287–88 Laster; 17227–28, 17270 Martin). A few authorized dealers said they took competition into consideration (2475 Jeffrey; 17292 Moses; 14048 Culver; 11435 Gorlin) and several

[14] In addition a Beltone dealer may be afforded a "100 percent Advertising Reserve" based on a percent of his purchases of cords and batteries from Beltone (CX 28Z117).

[15] CX 482, 486, 491, 518–520, 535, 537, 543, 547, 550, 562, 568, 596, 600.

said they also took the estimated sales of new Beltones for the coming year into consideration (*see* 17384 Beattie; 11712 Lucas; 17480 Mitsdarffer; 14238 Owenby).

The record shows that the retail price is generally three times the wholesale cost of the instrument. Several dealers testified that at times they sold all instruments at a single retail price (17411 Beattie; 12942–44 Borgeois; 12465 Coppola; 17163–64 Durbin; 12055 Hulser).

30. Many of the dealers testified that they conducted service centers in various population centers within their area of primary marketing responsibility on a regular basis, usually once a month. The principal purpose of the service center is to afford users a more convenient opportunity to obtain regular service on their hearing aids than returning to the dealer's office or awaiting a house call from the dealer or one of the consultants (*see* 15678 Pruitt; 15604 Jones). These service centers were open for a half a day or until all users who visited them were serviced. The service centers were usually held in motel rooms or drug stores (*see* 12093 Galloway; 16268 Rice).

Many dealers also maintained branch offices or sub-offices. These branch offices were usually the headquarters for consultants, and some had branch managers. Many dealerships were created by a dealer's selling his business interest in a branch office, including furniture and user lists to his branch manager contingent upon Beltone's appointing that branch manager as an authorized Beltone dealer (*see* 12510–11 Hood; 11417 Gorlin; 12721 Ivy; 18202 Tabor). **[33]**

Branch offices could not be created or set up by dealers except with Beltone's permission and dealers could not grant consultants in these branch offices any franchise rights (6161 D. Smith; *see also* CX 401, Art. 10).

31. The dealers attended Beltone's international conventions in the even numbered years and 3-day regional meetings during the odd numbered years (*see* CX 28Z184–85; 4884 D. Barnow).[16] At these meetings, seminars relating to business were held at which the Beltone officials and employees would discuss Beltone and Beltone business with the dealers.

Beltone gives several awards to its dealers and consultants. For dealers there is the President's Cup, granted to the outstanding dealer in the United States (CX 28Z189). Dealers may also receive

[16] The dealer agreement required and the dealers were expected to attend Beltone-conducted meetings (*see* CX 401 Art. 6; CX 548, 549).

the Dave Barnow Regional Award, one award being made for each of Beltone's regions (CX 28Z189).[17] Every dealer who achieves or exceeds 100 percent of potential receives a "Pacesetter" award (CX 28Z191).

Consultants who sell over a certain number of hearing aids in any year receive special awards.

The names of dealers achieving 100 percent are listed in Beltone's Honor Roll that is published in the Beltone Dealer Newsletter along with the Consultant's Glory Sheet, wherein are listed the names of consultants who sold 10 or more hearing aids in the previous month (CX 28Z186–87; 12603 Hood).

All President's Cup winners who are active Beltone dealers are automatically members of Beltone's National Advisory Counsel which is comprised also of dealers nominated by the HOFEs and selected by the dealers in each region (*see* CX 28Z190, Z205). Beltone HOFEs and home office personnel are also members of this counsel, the purpose of which is to provide a "creative resource for new ideas, suggestions and proposals which contribute to the continual advancement of the Company and of all members of the Beltone Family" (CX 28Z205, *but see* CX 540). **[34]**

32. Throughout its history Beltone officials have expressed the idea of the "Beltone family" which consists of the people in the corporation, officers and employees, and the dealers and their employees, and the users.[18] They have also promoted the concept of "loyalty" within the "family" (*see* CX 28D; *see also* CX 6Z157, *in camera*).

David Smith testified that he had used the word "loyal" in a speech given to the dealers at 3-day regional meetings one year (1970 or 1971). ". . . [E]very effort of the marketing division, from the very top through every staff member, to every HOFE in the organization, is [geared] and has as its objective to do everything in our power to earn the loyalty of our Beltone dealer organization" (6426):

They are our customer. When I say earn, I mean by doing advertising to help them, by helping them train their office staff, by helping them hire outside people, helping

[17] No dealer can earn either the President's Cup or the Regional Award unless he has achieved at least 100 percent of potential during the year for which the award is made (CX 28Z190).

[18] *See* CX 28Z185: "To demonstrate our interest in your selling organization, David Smith will send a personal letter of welcome to each new Consultant that you have told us has joined your organization.

"We believe that nothing will serve to bind the new Consultant closer to the Beltone Family than an awareness that the Family is personally interested in him."

David Smith also wrote a letter to the new dealer welcoming him "to the Beltone family of dealers, the hardest-hitting hearing aid sales organization in America." He added: "we all have confidence in you as a member of the great Beltone Team" (CX 513A; *see also* 536A, letter by Ben Wofford, Sr., National Field Sales Manager; 538G, letter by Shymanik).

In his letter to consultants David Smith welcomed them to "one of the closest-knit, hardest-working and fastest-growing sales organizations in the country" (CX 530).

them train them, do absolutely anything that will make them feel that Beltone is the kind of company that they want to do business with.

But in no way does that mean that they have to sell only our products in order to be loyal, if that is what you are driving at. But it is true we do anything we possibly can to earn their loyalty in terms of making them feel like they want to do business with Beltone.

The ultimate manifestation of the fact of loyalty is for dealers to buy only Beltones (6430–33 D. Smith). **[35]**

33. Dealers generally clean, adjust and service hearing aids in their offices, but are not equipped technologically to make repairs, other than minor ones such as replacing molding tubes, and must send aids in need of repair elsewhere, usually to the factory, for service (9082 Bain: Subminiaturization has made replacement of parts by dealers difficult; 9449–50 Selznick: "I don't repair hearing aids"; 11024–25 Mattingly: "hearing aids are so sophisticated today that the repairs that we can do are quite limited . . . if there is something wrong, we have to send it to the factory").

While non-Beltone repair laboratories exist and accept Beltones for repair, Beltone factory repairs are preferred by both dealers and customers (9449–50 Selznick: tried non-Beltone laboratory but returned to Beltone because of price and quality; 1488 Ziegler: "People that buy Beltones like to have them repaired at a Beltone factory"; 676, 679–80 Plyler: three customers refused to leave their aids for repair when told they would not be serviced by Beltone). Moreover, it is not disputed that Beltone refuses to sell repair parts or to provide schematics to other than authorized dealers and will not make specification sheets or other technical information available to unauthorized dealers (594–95 Wagner; 2075 Taylor; CX 169, 170, 164, 184), making dealers even more dependent on factory service for repairs. Thus, access to Beltone factory repair service is an important business asset of a dealer.

As already found (Finding 24), Beltone provides a one-year guarantee which includes free factory repair service, on its new Beltones if, and only if, a guarantee registration card is sent to the company by an authorized Beltone dealer within the 150 days specified.

If an aid under warranty is sent to the factory for repair by a dealer other than an authorized Beltone dealer, it is Beltone's policy to repair the aid but to return it either to an authorized dealer located near the user or to the user himself if there is no authorized dealer conveniently close to the user (CX 329, 351, 149, 152). This policy of by-passing the non-Beltone dealer has been implemented frequently, particularly in connection with terminated Beltone

dealers (2134 Benoit; 2658-60 Musselman; 673-76 Plyler; 1486 Ziegler).

It is Beltone's policy to provide factory repairs on Beltones not covered by warranty only when the repairs are requested by authorized Beltone dealers (CX 351; 513 Wagner: only authorized Beltone dealers could send in for repairs). [36]This policy has been manifested when terminated Beltone dealers who have sent in Beltones not under warranty have received the aids back unrepaired (CX 152; 2658 Musselman; 2134 Benoit).

About "Potentials"

34. Beltone assigned to each dealer a "potential" for his area of primary responsibility, expressed in terms of a number of hearing aids to be ordered from Beltone per month. The dealer was obligated by his dealer agreement to use his best efforts to achieve the potential set for his area (CX 401, Art. 1).

According to the Beltone Procedure Manual, the potential for each dealership was individually calculated and based on consideration of the (1) population of the area, (2) age of the population, (3) socio-economic condition of the population, and (4) density of the population. Further, the Manual states that potentials were maintained "as a means of stating in meaningful terms the normal, achievable goal for each Dealer." (CX 28Z83). D. Barnow testified that potential is "what the market has in it that can be produced" (4719). Dealers understood that "potential" represented the amount of hearing aid sales that could reasonably be expected to be made in an area determined by using strictly empirical data (17304 Moses: "the amount of potential business in a given area that is achievable"; 13262 Levy: "what the area could reasonably expect to do"; 13669 Paul: "what my marketing area could provide"; 16279–D Rice: the number of units that should be easily sold out of this area; 17149 Durbin: gauge as to potential market for hearing aids in the area of primary responsibility; 12102 Galloway: "what I would reasonably expect to do in terms of fittings of new instruments in the area"; 12529 Hood: figure achievable for that particular area). Actually, the four population factors noted were used to derive a formula whereby the Beltone company's total sales goal was divided among all its dealers (4721 D. Barnow). Thus, the "measurable, statistical, marketing facts" outlined in the Manual as the basis of the potentials (CX 28Z83) were actually used to distribute the company's sales goal rather than to set it. Evidence of this fact is the testimony of dealers who had their potentials increased despite decreases in population in their areas (11032–34 Mattingly; 16350 Metcalfe; 2864 Peterson). Respondents testified that they increased their potentials "from time

to time depending upon the increase in total volume that the company experienced" (5006 D. Barnow; *see* 8443 Sauls). **[37]**However, it was admitted that potentials had been set which exceeded the sales of the company and that potentials were set "ahead of what the average Beltone dealer is doing" (5009–10, 4721 D. Barnow; *see* 15806 Wofford, Sr.).

Potentials were, in effect, quotas and served as required minimum sales figures. Ex-HOFE Griffith testified that the designation "potential" was a misnomer because potential in the company's eyes was the "minimum acceptable performance sales-wise" of a dealer, rather than the possible number of sales for the area. "In that respect, the word would mean quota" (1816–17). In its communications with dealers, Beltone treated the potential as a minimum (CX 67: letter to dealer Taylor stating that "anything less than 100% of potential in an assigned marketing area is unacceptable"; CX 49: letter to dealer Wagner referring to 100% of potential as the minimum of performance). While the dealer's agreement obligated a dealer only to "use his best efforts" to achieve potential (CX 401, Art. 1), the HOFE's Manual lists failure to meet potential as grounds for termination (RX 20Y-20Z), and ex-HOFE Griffith testified that if a dealer continuously failed to meet his potential, he would be terminated (1818). Dealers were told by Beltone that their dealerships were perpetually contingent on their achieving 100 percent of potential (1193 G.G. Smith: was told during discussions preliminary to acquiring a Beltone dealership that "we would have to keep our quota up in order to retain the franchise"; CX 506: letter to dealer Lathrop advising him if he did not immediately build up his business to 100% of potential, a recommendation of termination would be forthcoming). Dealers were threatened with termination if they did not reach potential (4303 Davis; 3111 Stephen; 1145 Sable; 1325–26 Thompson). Other dealers feared termination if they did not reach potential (2225, 2227 Peters; 268 Thomas). It is not surprising that many persons associated with Beltone (dealers and HOFEs) regarded potentials as quotas (4357 Davis: his HOFE called it quota; 1143 Sable: HOFE Selznick referred to it as quota; 1816–17 Griffith: used the word quota when talking with other HOFEs but not when speaking with dealers; 3109 Stephen: regarded it as quota; 2116 Benoit: "we called it quota"; 2335 Archer: "quota, as far as I am concerned"; 1469, 1473–74 Ziegler: in my mind it was a quota; 2021 Taylor: "I call it quota").

Dealers were constantly reminded of their potentials. Not only did Beltone send to each dealer a monthly data form showing his performance in terms of achieving potential (2116 Benoit), but also it

contacted dealers who were not making potential, through its HOFEs or by mail, and exerted pressure on them to increase their sales (CX 67, 49, 506; [38]8172 Sauls; 4303 Davis; 2223–24 Peters; 3111 Stephen; 1212 G.G. Smith; 2117 Benoit; 2335 Archer; 1952 Taylor; 638 Plyler: "constant, unrelenting pressure"; 1646 Lathrop: "continual pressure bordering on harassment"). The Beltone Bonus Plan, which provided for bonuses for HOFEs based on increases in the percentage of potential reached by the dealers in their areas (RX 19Z19; 4932 D. Barnow) served as an incentive to HOFEs to encourage their dealers to reach potential. In addition to threats of termination as mentioned above, threats of reduction in advertising and leads were made by Beltone to dealers not reaching potential (1448–49, 1472, 1474 Ziegler). The effects of this constant pressure is made strikingly apparent by testimony of dealers who admitted that in order to achieve potential they had fit a Beltone when they knew another brand would better serve a customer or had fit a new, current-line Beltone when a cheaper one would perform adequately for a customer (used or discontinued model Beltones did not count towards achieving potential) (636–38 Plyler; 2118–19 Benoit; 2321 Archer).

As pointed out above, potentials were set above the level of what average Beltone dealers were achieving. Many dealers felt their potentials were set unrealistically high and were impossible to reach (2222 Peters: "I couldn't see how we could make that . . . potential"; 10948 Sloane: "I think the goal is too high"; 2116 Benoit: was unrealistic, "each time I would get closer to it the potential would go higher"; 2864 Peterson: "I found it extremely difficult . . . to meet the original potential").

35. The concept of potentials was used by Beltone to produce and insure adherence to its company policies. If a dealer was not reaching potential and also deviating from Beltone policy, he was likely to be terminated. D. Barnow testified that failure to meet potential was never the sole reason for termination. "If the man would meet us half-way and show evidence of making an effort to improve himself and to improve his skills and improve his volume of sales, we would worry along with him forever, if necessary, but where we did not get this kind of cooperation and this kind of evidence of intention to improve we had no alternative but to seek our representation elsewhere" (4724). The "evidence of making an effort to improve himself" to which Barnow referred was tantamount to strict adherence to Beltone policies (15968 Tibault: potential was "a realistic figure that can be obtained if you

undertake Beltone's program . . . if you implement Beltone's marketing progam"). [39]

Beltone used the threat of termination for failure to meet potential as a club to force dealers to adhere to its single-line policy. Several dealers testified that potential could not be met if less than a dealer's total effort was spent encouraging Beltone sales (4301–02 Davis: couldn't make potential if efforts were directed at selling other brands; 3111 Stephen: didn't have time to sell other brands and still make potential; 1645 Lathrop; one couldn't direct efforts to selling brands other than Beltone and still make potential; 1952 Taylor: I probably couldn't make the potential the company wanted since I was multi-line). Dealers were advised by Beltone to stop selling other brands in order to make potential (1953, 2021 Taylor: was told he could never make potential selling other brands, 2576 Mussleman: was told he couldn't possibly make potential if he divided sales among more than one manufacturer). That Beltone's admonishments were effective is seen by the fact noted above that dealers sold Beltones though other brands would have been more suitable. Dealer Taylor testified that after reprimands regarding his sale of other brands and his not making potential, he sold fewer competitive brands because of the pressure to reach potential (1956).

Beltone compelled expansion of its dealers' businesses through the use of potentials (2223 Peters: one would have to have help from salesmen to make potential; 14574–75 Langham). When dealers failed to make potential, they were encouraged by Beltone to increase their manpower (16352 Metcalfe: Beltone suggested hiring more representatives; 4303 Davis: when didn't make potential, HOFE Sivek contacted him and advised him to hire more people; *see* 7235–36 Westmoreland). Dealers who did not follow Beltone's suggestion that they hire people were likely to be terminated (6116 D. Smith: "[I]f he was willing to hire more people, . . . we would continue with him indefinitely. But if . . . he refused to hire anybody to help him in his business . . . we probably would terminate him").

About the Areas in which Beltone Authorized Dealers Sell Beltone Products

36. It is not disputed that Beltone appoints only one authorized dealer in any given area of primary marketing responsibility, and that Beltone sells its products only to authorized dealers (*see* 4731 D. Barnow).

Of the approximately seventy dealer-witnesses presented by respondents many testified that they never went outside of [40]their prescribed areas to make sales (17043 Allen; 12905 Borgeois; 15252

Byron; 17135 Durbin; 15496 Gilliam; 17884 Glaspie; 12495–96 Hood; 12335–36 Johnson; 12798 Keel[19]; 14550–60 Langham; 13510 Magures; 17233 Martin; 16338 Metcalfe; 14971 Miller[20]; 16456 Partin; 13664 Paul; 15034 Pierson; 13452, 13470 Ribinowitz; 16251 Rice; 13318 Wheeler). Several dealers testified that when their consultants had made sales outside their respective areas they had admonished them to stay inside the assigned areas (12911–12 Borgeois; 12519 Hood; 15455 Jeter; 13570 Morris).

Some of respondents' dealer-witnesses testified that during the time that they were Beltone dealers they had made one or two sales outside their prescribed areas (15605 Jones[21]; 13209 Levy; 14890–92 Madsen; 13570 Morris; 13136 Pennet; 14334–36 Perisho; 16527–28 Rawlings; 15954 Tibault; 15768–69 Wofford, Sr.).

Mr. Bruner testified he never sold outside his area except when asked to do so by his neighboring Beltone dealer (14690).

Many of repondents' dealers testified that the sales that they made by actually going outside their prescribed areas were only in situations where they had personal referrals from one of their customers (15194 Bisel; 11938–39 Cato; 14042 Culver; 13008 Harlow; 12035 Hulser; 11705 Lucas; 11267 McCurdy; 18117 Osnowitz; 13387 Scheutzow; 9440 Selznick; 17967 Sturtz; 13096 Tabokin[22]; 15676 Pruitt[23]; 11564 Ugoretz). [41]

Some of respondents' dealer-witnesses testified that they did make some sales outside their prescribed areas (17381, 17416 Beattie: "once in a while", 4 or 5 at the most per year; 12436 Coppola: a few outside; 15340 Elias: "I imagine that I had stepped over the line"; 11428 Gorlin: some sales outside when West Palm Beach was open; 16184 Hudson; 12733–34 Ivy: doctor referrals and customer referrals; 15427 Jeter: "not [outside] as a regular thing"; 14789 Kindopp: rural routes; 11181 Lipin: direct referral from a client or some professional person; 11019 Mattingly: "numerous aids" in Putnam County; 17490 Mitsdarffer: "several occasions"; 17293 Moses: occasional sales outside; 14236–37, 14282 Owenby: since 1968 has sold outside only by invitation; a total of ten instruments; 15155–56 Proctor: a few referrals outside; 15883, 15926 Azar: fits in mountain areas even though out of his terrritory, a total of between 5 and 10 since 1963.)

[19] Mr. Keel, a Beltone dealer for almost 30 years, stated that "most of the Beltone dealers are gentlemen enough to respect other people's rights" (12798).

[20] Mr. Miller stated that he never sold outside his area "for loyalty and good feelings, we just have our own area" (14971).

[21] Jones testified that since 1957 he made one sale outside on a referral and that the neighboring Beltone dealer complained (15605–06).

[22] Mr. Tabokin "felt it was not ethical for me to sell" in another area (13096).

[23] Mr. Pruitt testified he made sales outside his area on personal referral or where the post office was on the line, and that he contacted his neighboring Beltone dealer in advance of making such contact with the prospect (15678).

Of the remaining dealer-witnesses presented by respondents, several testified that they actually solicited business outside their respective areas of primary marketing responsibility. Mr. Bain testified that he made sales in San Bernadino during the time that it was in Mr. Abrams' area (9028). Mr. Galloway testified he sold hearing aids in surrounding counties, that "I have a right" (12091–92). Mr. Kauffman, a dealer in Chicago testified: "I sell them wherever I can" (9607). Mr. LaMontagne said "[i]f we feel we can service it we sell it" (18048). Mr. Laster sold in adjoining counties on recommendations and on answers to advertising (18294). Mr. Sloane stated that "if there was an opportunity to make a sale, they . . . ought to . . . try" (10940). And Mr. Wofford, Jr., another Beltone dealer in Chicago, sold outside his area (10091).

Most of the dealers testified that they would sell new Beltone hearing aids to persons who reside outside their respective areas when the person came to their offices, or other places of business. If the user did not plan to return to the dealer's office or service center for service, the user was referred to the Beltone dealer located in his home area, and many dealers would send the user's file to the other Beltone dealer (*see* CX 28Z198).

On this record there is no doubt that Beltone's authorized dealers as a general course of business practice confine their sales of new Beltone hearing aids to their respective areas of primary marketing responsibility (*see* Appendix A, pp. 1–15, *infra*). When asked, they all testified **[42]**that such a limitation was their own choice, most of them stating that either their own area was all they could take care of or it was not practical to try to service customers too far away from their offices or service centers.

37. Respondents deny that they *require* their selected dealers to sell Beltone products only within the assigned areas of primary marketing responsibility, contending that there is no such requirement in the dealer agreement and that the HOFEs are specifically instructed not to tell the dealers where they are to sell Beltone products (*see* RX 20W).

Beltone's Franchise Agreement provides as follows:

> Article 1. BELTONE hereby appoints DEALER a retail DEALER for the sale of BELTONE Products within the following area of primary marketing responsibility: [the agreement designates a specific geographic area usually by town, county, or postal zone (or zip code)] DEALER hereby accepts such appointment and agrees to use his best efforts to promote and increase the sale of BELTONE Products throughout such area and to achieve the market potential determined, from time to time, by BELTONE [CX 401].

Counsel supporting the complaint assert that although the lan-

guage of Article 1 is not specifically phrased in terms of territorial exclusivity, the provisions thereof along with other provisions in the agreement have the effect of restricting dealers' sales to the designated areas. In this respect they point to the provision that requires a dealer to use his best effort to achieve a "market potential" within the assigned territory, the provision that prohibits establishment of branch offices, sub-offices or retail locations without specific permission of Beltone,[24] the provision that establishes a lead program wherein Beltone supplies a dealer only those "leads" residing within the dealer's area,[25] and the provision providing for termination of the agreement if any provision thereof is violated. **[43]**

In addition, Beltone apparently requires that a dealer service the customers to whom he sells (7025 Westmoreland; 8724–25, 8812 Sivek). Actually the franchise agreement requires any dealer to service any Beltone user who seeks such service. Article 7 provides:

> DEALER shall give full cooperation and assistance to all users of BELTONE Products whether or not purchased from him, and shall comply with all BELTONE service plans, including the BELTONE Certified Hearing Service Plan. Services performed by DEALER shall conform with the standards of quality established by BELTONE. DEALER shall not make excessive service charges and shall not make any service charge on BELTONE Products within guarantee, whether or not purchased from him.

As a regular practice Beltone dealers send to Beltone all "leads" procured by the dealers' own promotional efforts, including those physically located outside his area of primary marketing responsibility.[26] During the existence of the Los Angeles Metro Group, the dealers specifically arranged to have leads acquired at the fair and home show distributed among them according to their geographic areas.

Finally, Beltone has promoted the concept of the "Beltone family" and dealer "loyalty" one to the other, which according to the dealers,

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[24] "Article 10. . . . No branch office, sub-dealership, or retail location other than set forth herein shall be established by DEALER without BELTONE's prior written consent."

[25] "Article 4. On all leads (names and addresses of prospective purchasers) furnished by BELTONE, DEALER shall report promptly to BELTONE, on forms supplied by BELTONE, the results of such leads and other information relating thereto, as BELTONE may, from time to time, require in its DEALER procedure manual or otherwise. All leads furnished to DEALER by BELTONE shall be and remain BELTONE's sole property and shall not be used by DEALER, at any time, for any purpose other than to sell BELTONE Products."

[26] Dealer Thomas testified that in order to get co-op money for fairs a dealer was required to send lead names accumulated at the fair to Beltone (408). Article 6 of the Franchise Agreement provides:

> BELTONE shall make available to DEALER, from time to time, assistance, training, sales aids, advertising and promotional support, product information, and equipment (on loan or rental). DEALER shall make full use of all such assistance and material and shall participate in all BELTONE programs, such as its National Training Centers, Regional Meetings, and National Conventions. DEALER shall comply with all the terms of BELTONE cooperative advertising plans and other programs.

included respect for the areas assigned to other dealers. In this respect, it was Beltone's policy to announce to its dealers that it chose to do business with only one dealer in any given area (*see* 2315 Archer).

Of the twenty-one dealers who were presented by complaint counsel, eighteen of them testified about where [44]they sold Beltone products. Five dealers testified they never sold outside their assigned areas (2095 Benoit; 4300 Davis; 1644 Lathrop; 2865 Peterson; 484–85 Wagner).[27] Mr. Taylor testified that staying in one's own area was an "unwritten law, really" and that he "never digressed from that" and that he only went outside with permission of the dealer in that other area (1956, 1968). Mr. Sable testified that he sold Beltone products in Brockton (not a part of his area) when it was "open" (no Beltone dealer there) and that except for that period, he did not sell outside his assigned area (1137). Mr. Stephen instructed his consultants to sell only within his assigned area (3105).

Mr. Peters testified that the members of the Los Angeles Metro Group agreed that they could sell outside their areas on referrals, but that there were "very few" (2288–89).

Several dealer-witnesses testified that they understood their areas to be "protected", that no other dealer would sell Beltone products there (2315–16, 2352 Archer; 2228 Peters). And several dealers testified that they were instructed by their HOFEs as to where they should make their sales of Beltone products (1544 Ziegler: "good idea to stay within your own territory we were told"; 650–52 Plyler: could follow "leads" on mail route that crossed "boundaries" of area).

Some of the dealer-witnesses presented by complaint counsel testified that they made sales to customers outside their areas (825 H. Smith; 1460–61 Ziegler; 2327–28 Archer). Mr. Musselman, a dealer in Ohio, testified that he opened an office in Pennsylvania to service a particular doctor's referrals (2594, 2606). Mr. Thompson testified that on one instance when he made a sale outside his area "there was quite an uproar about that" (1334). Mr. Oldham testified he knew he wasn't supposed to go outside territorial bounds and he was admonished by his HOFE when he made a sale in another dealer's territory (3088). [45]

In several instances a dealer's office or sub-office was located very close to a boundary of his area. Nevertheless, these dealers did not cross that boundary to make calls on prospects (*see* 17169–75 Durbin; 15532–44 Gilliam; 14821–23 Kindopp).

Moreover, on the guarantee registration form there appears a box

[27] Mr. Thomas testified that he never solicited business outside of his area (219, 226).

"purchased in this territory but lives elsewhere" (CX 28Z92–93). Beltone explains: "This information should be provided whenever a sale is made to a prospect whose home address is outside your own area of primary marketing responsibility. This is important marketing information to us as it indicates the buying habits of hearing aid purchasers" (CX 28Z93).

Also the customer referral notice, which is designed to apprise another dealer of a customer or prospect in his area, does not provide for a situation where a dealer sells a hearing aid in another dealer's area. The three options are: "Purchased while visiting in our territory"; "Serviced while visiting in our territory"; "Resident moving out of our territory" (CX 28Z198).

That dealers generally considered their respective areas to be exclusively theirs is manifested by the number of them that registered complaints to Beltone about sales made by other dealers in their areas (2327, 2334 Archer; 1644–45 Lathrop; 13096 Tabokin; 2594–95 Musselman; 3087–88 Oldham; 1344 Thompson; 9125 Bain; 12519 Hood; 15606 Jones; 9627 Kauffman; 11112 Lipin; *see* CX 366, 452, 465, 467, 475B, 493).[28]

It is found that Beltone did require its dealers to confine sales to their areas of primary marketing responsibility, and that the only exception that was permitted was in those instances when the dealer had a direct, personal referral from one of his customers and where subsequent service of that user could be performed by the dealer making the sale.

About the Brands of New Hearing Aids Sold by Authorized Beltone Dealers

38. It is not disputed that Beltone has an announced policy that it believes that single-line dealing by a dealer is [46]beneficial to the dealer, user and manufacturer. This was stated in the letter that accompanied the 1957 dealer agreement that followed issuance of the Commission's 1956 order to cease and desist and was a constant instruction to the HOFE as one of the things he could say to a dealer when the question of competitive brands arose (4731–32, 4901–02 D. Barnow).

Many of the approximately seventy dealer-witnesses presented by Beltone testified that in their sales of new hearing aids they sold the

[28] *See also:* 6354–6359 D. Smith; 7022, 7163, 7268–69 Westmoreland; 8731 Sivek; 8444, 8470–71, 8241–43, 8476 Sauls; 10316, 10322–29, 10346–47, 10400, 10409–11, 10489 Nealon.

Beltone brand only (12901 Borgeois; 14687 Bruner; 15249, 15263 Byron[29]; 12435 Coppola; 15340–46 Elias; 12077 Galloway[30]; 12493–94, 12515 Hodd; 16142–43 Hudson; 15424 Jeter[31]; 12333 Johnson; 15598 Jones; 14549, 14556 Langham; 11698 Lucas; 17225 Martin; 11015–16 Mattingly; 11263–64 McCurdy; 14967 Miller; 13565 Morris; 16455, 16466, 16474 Partin; 16250, 16266–67 Rice; 9441–42 Selznick; 17960 Sturtz; 13090 Tabokin; 18209 Tabor; 15953, 15961 Tibault; 15680 Pruitt; 13317 Wheeler; 15764 Wofford, Sr.; 15881 Azar).

Some of these dealers testified that they made sales of non-Beltones on clinical referrals for specific brands only (15111–12 Proctor; 13467 Ribinowitz: except for one Rexon he won at a state meeting raffle; 13379–81, 13410 Sheutzow: except one Siemens in 1966 or 1967; 10966 Sloane; 13805–06 Yarlott; 17040–41, 17046–47 Allen: except one Starkey a lady asked for; 17379–80 Beattie; 13905–06 Burak: not quite 100% Beltone; 11927, 11978–79 Cato; 14036–37, 14085 Culver: "has quit this"; 15495, 15501 Gilliam: one referral; 11424–25 Gorlin; 12727–30 Ivy; 11101 Lipin; 13506 Magures: "if we get a request from a clinic"; 17288–90 Moses; 18112–13 Osnowitz: "primarily" Beltone except "occasionally we'd have a referral for a specific brand").[32] **[47]**

And some of those dealers testified that they made occasional sales of other brands (13659 Paul: "occasionally"; 13175–76 Pennet: non-Beltone "small very negligible" percentage; 14345–46 Perisho: one Zenith and Starkey very recently; 10091 Wofford, Jr.; 15192, 15227 Bisel: not all on medical referrals; 17138 Durbin: "only two instances I can recall"; 17891 Glaspie: "a few Starkey"; 13002–03 Harlow: some competitive aids; 12034 Hulser: "a couple of occasions, but very seldom"; 14780–81 Kindopp: "Starkey . . . in the last 90 days . . . very few Starkeys"; 18043–44 LaMontagne: "By far the Beltone brand"; 13206–08 Levy: "on rare occasions" non-Beltone; "about a half dozen" Starkey custom mold aids; 14881 Madsen: "90% Beltone"; 12226–12228 McMillian; one Zenith, one Fidelity; 16332 Metcalfe: "Beltones with the exception of one instance"; 14234 Owenby; 9016–18 Bain: "primarily" Beltone).

Mr. Kaufmann testified that he had twenty companies listed with state agencies and that over the years he had sold other brands of hearing aids and had sold 50 Starkey hearing aids in 1974 (9610,

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[29] Mr. Byron testified that he had experimented with Fidelity at one time but had replaced all of those fittings with Beltone hearing aids (15263–64).

[30] Mr. Galloway testified that for a 10-year period ending in 1969 he operated a separate business located in a department store through which he sold other brands (12083–84).

[31] Mr. Jeter said he purchased some Fidelity but returned them, never having sold one (15425–26).

[32] It should be noted that at dealers' meetings in San Francisco and Los Angeles in January 1975 dealers asked National Field Sales Manager Westmoreland what they should do when they received clinical referrals for other brands. Westmoreland told them they could do whatever they wanted to do with it (7060–66).

9666). Mr. Laster testified he had sold 25 Starkey aids (18289–90, 18335). Mr. Pierson testified he sold other brands, and at one time sold Audivox over 8 months with D. Smith's permission and purchased 15 to 18 Starkey aids (15024–30). Mr. St. James testified that before 1970 be bought some Electones from a friend and had fit other brands (12653–56)[33]; Mr. Ugoretz testified he sold over 95% Beltone but had sold Fidelity and Dahlberg (11585).

The former Beltone dealers presented by complaint counsel also testified about the brands of new hearing aids they sold while a Beltone dealer. Mr. Lathrop sold only Beltones from 1964 to 1972 (1630–31, 1715). Mr. Oldham testified that he sold only Beltone and some used other brands (3068). Mr. Sable testified he dared not sell other brands (1093).

Mr. Benoit testified that except for isolated instances he sold Beltone, and was under the impression that if he sold other brands he would be terminated (2106). After 1970 he did sell other brands (2114). Mr. Davis who in 1961 considered his franchise "single line" (4292) testified that until 1972 he sold only Beltones (4294) although he might [48]have sold other brands "once or twice" on a clinical referral or to match a competitive one worn by a user (4380–81). Mr. Jeffrey testified that at the beginning of the authorized Beltone dealership he sold only Beltone, but later on sold other brands featuring AVC on specific clinical referrals (2442–43). Mr. Laird testified that from 1960 to 1965 he sold Beltones only, and, thereafter, a few other brands, either on medical or clinical referrals or special instruments not in competition with Beltone (2521–23, 2541).

Mr. Peterson testified that he sold mostly Beltone, some others on medical referral and one Siemens to a lady in South America (2861–62). Mr. Stephen testified he sold Beltone only, except when dealing with the State [of Texas] (3105–07, 3141). Mr. D. Thomas Smith testified that besides Beltone, he sold Norelco on clinical referrals and certain compression aids (AVC) (1893–94, 1897–98). Mr. G.G. Smith testified for the first four years of his Beltone dealership he sold Beltone only except for one Vicon he sold to a special customer when a Beltone did not help the user. After 1967 he sold other brands including Qualitone, but these sales were less than 10% of his total sales (1196–98). Mr. H. Smith testified he sold some other brands on specific referrals early in his dealership and later sold some other brands (787, 826–27). Mr. Taylor testified he sold only Beltones until 1965 or 1966 (2002, 2015). He became a Beltone dealer

[33] Most of these competing brands of hearing aids were replaced with Beltones (12655).

in 1947 (1945). Mr. Wagner testified he sold only Beltones from 1960 to 1965, and a total of 4 non-Beltones from 1965 to 1970. Thereafter he sold Audiotone and Oticon because he got better results with compression (486, 492–93).

Mr. Thomas testified that he sold Beltone only the first year of his dealership (243). Mr. Plyler testified he sold almost all Beltones, especially after his HOFE commented when he sold a special fitting of another brand, although he had sold Fidelity bone conductor instruments (631, 636, 709, 718).

Mr. Archer testified he sold only Beltones out of his Tacoma business which was his Beltone dealership, although he had another hearing aid business in Yakima where he sold other brands, but not Beltones (2360, 2317–20). Mr. Peters testified that he sold other brands after the Crown Corporation (Mr. Flarsheim) became a Beltone dealership. These were replacement aids for old non-Beltone customers. [49]After Flarsheim resigned, Crown went multi-line (2218, 2275, 2279).[34] Mr. Thompson testified that he sold other brands, after the first two years of selling only Beltones, and that he sold other brands of hearing aids after he purchased another hearing aid company in 1971 (1314, 1324, 1362, 1400–1401).

Mr. Ziegler testified that while he sold Beltone only,[35] he purchased some Electones to rent to certain users. Toward the end of his dealership, after a meeting with a Beltone HOFE, he started to sell Electones (1437, 1572). Mr. Mussleman testified he sold only Beltone until 1973 or 1974. Mr. Mussleman became an authorized Beltone dealer in 1963 (2559, 2570, 2597, 2728).

On this record there is no doubt that the Beltone authorized dealer was for all intents and purposes a single-line dealer in that he "carried"[36] only the Beltone line (*see* Appendix A, pp. 1–15, *infra*). Almost all of the dealer-witnesses who were presented by respondents testified further than they made the independent choice to "carry" Beltones only, giving as reasons for that choice (1) that Beltone had a complete or full line (*see* 17042 Allen; 15495 Gilliam; 16143 Hudson; 12035 Hulser; 11850 Nelson; 15026 Pierson: "complete line"; 15881 Azar), (2) that the Beltone hearing aid was a quality product (*see* 13907 Burak; 15245 Byron; 14036 Culver; 17134 Durbin; 15340 Elias; 12077–78 Galloway; 12729 Ivy: "clearer sounding instrument"; 15425 Jeter; 11100 Lipin; 11699 Lucas: "I don't feel

[34] Crown continued to handle Beltone hearing aids for a year after Mr. Flarsheim sold his interest in the business to Mr. Peters, although Beltone would not grant a dealership to Mr. Peters (2278–79).

[35] With exception of one Oticon purchased by a customer who requested that aid (1438–9).

[36] "Carry" in this sense means display and promote a product line. Occasional sales of other brands, on specific clinical referral ("prescription") or special preference of the customer (cosmetic appeal), does not change the status of a dealer as "single-line." (*see* 9023–4 Bain.)

there is a competitive aid that is any better"; 14219 Owenby; 16267 Rice; 18210 Tabor: "never found anything as good as Beltone"; 15954 Tibault; 10106 Wofford, Jr.; 15881 Azar; *see also* 2107 Benoit), (3) that they could fit any fittable hearing loss with an instrument in the Beltone line (*see* 17042 Allen; 12435 Coppola; 11392 Gorlin; 12797 Keel: "most any type of loss that can be helped by amplification"; 11264 Mattingly; 11585 Ugoretz: "we can fit practically anyone that has a fittable hearing loss with a Beltone"), (4) that they had no need **[50]**to carry competitors' products (*see* 12901 Borgeois; 15495 Gilliam; 17882–83 Glaspie; 11392 Gorlin; 12515 Hood: "I know what a Beltone will do. . . . it is sufficient for my business"; 18044 LaMontagne: "you just don't need any other hearing aids unless it's an exceptional thing"; 13208 Levy: other than custom mold aid, "I haven't had any need for" other brands; 13506 Magures; 12228 McMillian; 18113 Osnowitz: "I have always found what I needed in the line"; 16527 Rawlings: "fit all the needs of the hard of hearing impaired"; 13452 Ribinowitz: "I thought I could do anything I had to do with the Beltone line of hearing aids"; 10985 Sloane: "Beltone has at least as good and usually better a fitting than any other brand"; 15954 Tibault: "met the marketing needs of the people that I was serving"; 15680 Pruitt; *see also* 2107 Benoit), or (5) that Beltone gave the dealers a great amount of support (*see* 15250–51 Byron: "loaner aids" program; 12078 Galloway; 12035 Hulser: "guarantee, the backing . . . was there"; 15425 Jeter: "good service"; 12333 Johnson; 15598 Jones: "felt loyal to Beltone . . . and still do"; 12794 Keel; 11100 Lipin: "good repair program"; 17226 Martin: "I wanted to return that support"; 14967 Miller: "good product . . . good service . . . guarantee for my user"; 17289 Moses: best for the customer, "very quick service from the factory"; 16455 Partin: "liked the product . . . liked the company, their operations, their treatment of their dealers"; 15026 Pierson: "Beltone's help, consumer acceptance"; 17961 Sturtz: "loyalty and team business"; 13318 Wheeler: "with all the helps that Beltone offered, including product . . . had no . . . desire to become multiple line dealer"; 10106 Wofford, Jr.: good product, good service; *see also* 2107 Benoit: loyalty).

Some dealers testified that to carry one line was good business. (*see* 9061 Bain: it was good business to have one brand and have more users in a single product; 15346 Elias: "can't do justice to more than one"; 14549, 14556 Langham: "adequate job" didn't choose to sell other brand; 14881–82 Madsen: "I like to stay with one brand where possible to eliminate a lot of different service problems that I might not be familiar with"; 17479 Mitsdarffer: "Like to feel . . . I can stand behind" product he sells, "difficult enough to keep up with

technical information necessary in one line"; 13565 Morris: "do a much better job, specializing in one good company"; 16267 Rice: "just prefer doing business with one company"; *see also* 1631 Lathrop: "there was no time to sell anything else"). **[51]**

The representatives of other manufacturers testified that when they had attempted to get a Beltone dealer to carry non-Beltone products, they had been unsuccessful to such a degree that these other manufacturers' representatives did not usually bother to call on Beltone dealers (3720, 3722–31 Saad; 3911, 3919–22 Skadegard; *see also* 15993 Kojis; 14407 Winslow).

Moreover, they described the Beltone dealer as "a pretty satisfied guy who is quite successful" (14419 Winslow). "The average dealer appears to be less sure of himself, less secure, more searching for help, I guess information. The Beltone dealer by and large is self-sufficient, self-sustained and secure, if I may use that term" (4254 Sturtz). "The Beltone dealer is more successful than his competitor." He is in a "straight jacket of his liking" (4260–61 Sturtz).

39. Respondents deny that they *require* their selected dealers to sell Beltone products to the exclusion of other brands, contending that there is no such requirement in the dealer agreement and that the HOFEs are specifically instructed not to tell the dealers that they cannot sell competing brands of hearing aids.

Complaint counsel assert that Article 1 (*see supra* p. 42) of the dealer agreement could be interpreted as providing that the dealer sell only Beltone products. But they add that even if it is not so understood, there are other provisions of the dealer agreement, as well as Beltone's business dealing with its dealers, that, in effect, require "single-line" dealerships.

First, complaint counsel refer to that part of Article 1 that requires a dealer to achieve a sales quota ("potential") within the assigned territory and argue that most dealers, could not make the effort to sell, much less make sales, of non-Beltones, and at the same time achieve potential. Second, they point to Article 4 (*see* n. 25 *supra* p. 42) and the provision that states: "All leads furnished to DEALER by BELTONE shall be and remain BELTONE's sole property and shall not be used by DEALER, at any time, for any purpose other than to sell BELTONE Products." And third, complaint counsel point to Article 6 relating to the cooperative advertising programs and the Dealer Manual which excepts from cooperative credit any advertisement which mentions, directly or indirectly that the dealer sells any competitive product. **[52]**

There is abundant testimony that Beltone encouraged its dealers to abide by its "single-line" philosophy. Significantly, most Beltone

dealers use the name Beltone in their business style (*see* CX 28Z125). Wofford, Sr., testified: "I think it would be utterly foolish for a man to have the privilege of having Beltone and not advertise it" (15805).

40. There is no doubt that the Beltone dealership is a valuable asset. In fact, in the hearing aid business a Beltone dealership was considered "the ultimate goal, as far as being a dealer is concerned" (1425 Ziegler). Notwithstanding, the dealer agreement provides that the dealership could be terminated by either Beltone or the dealer for no reason with 30-day written notice by certified mail. [37] Dealers were well aware that their agreements contained this provision.

Although the Beltone dealer is an independent businessperson[38] the nature of the business operation of the dealership was necessarily patterned by the emphasis Beltone placed on "lead procurement" through national advertising and the necessity for the dealer to make a personal "in home" call upon the prospect in order to report back the results of the call. For most dealers, in order to make these "in home" calls and reach the "potential" assigned by Beltone, it was necessary to hire "consultants" or field salesmen. A dealer who had consultants was generally termed a "manpower" operation. And much of the HOFE's efforts was aimed at persuading the dealer to embark on a manpower program, and then assisting in the recruiting, hiring and training of these consultants. This training, was, of course, Beltone-oriented. **[53]**The equipment supplied such as the Selectometer, was designed to sell Beltone hearing aids, and the carrying cases were marked with the Beltone logo. A significant number of dealer witnesses who were consultants for other Beltone dealers after 1960 testified that they sold only Beltones while they were consultants (17028–29 Allen; 8952–53 Bain; 12426 Coppola; 14017, 14026 Hood; 16131 Hudson; 12026 Hulser; 12307 Johnson; 18033 LaMontagne; 13496 Magures; 11006 Mattingly; 12200 McMilian; 17474 Mitsdarffer; 18105–06 Osnowitz; 14186, 14205 Owenby; 14322 Perisho; 15010–11 Pierson; 16523 Rawlings; 13361 Scheutzow; 9302 Selznick; 17951, 17954 Sturtz; 18198 Tabor; 11574 Ugoretz; 13779 Yarlott; 15866 Azar). A few testified that they had sold other brands while consultants (15187–88 Bisel: rarely some others; 12975 Harlow: "one occasion . . . a price instrument . . . a Fidelity"; 14759

[37] Article 15 of the dealer agreement reads: "Either party hereto may terminate this Agreement, at any time, upon at least thirty (30) days prior written notice to the other party. However, upon violation of any provision of this Agreement by either such party, the other party shall have the right to terminate the Agreement, immediately, by written notice. . . ."

[38] Article 9 of the dealer agreement provides: "DEALER is an independent contractor. Neither DEALER nor any of his employees, agents, or representatives shall be deemed, expressly or by implication, to be BELTONE's employee, agent or representative. None of them shall have the right to make any representations or incur any obligations on BELTONE's behalf. Nothing herein shall interfere with or prevent BELTONE from operating under any present or future program for the sale of BELTONE Products, including its Audiometric Instruments Division sales programs and government sales programs."

Kindopp: "towards the end . . . Fidelity"; 11658 Lucas: "there was a short period of time we had carried Audivox"; 15666–67 Pruitt: Beltone and "[o]n a very, very rare occasion . . . a particular type of fitting that could be better handled through the type of glasses that Fid[e]lity had."

Part of the recruitment process for consultants was conveying the understanding to newly hired consultants that if they were successful salesmen there was a possibility that they might become Beltone dealers (*see* CX 28Z186).

All things considered, it is found that Beltone's desire that its dealers be single-line dealers and carry only Beltone products was in almost every instance of record honored by the dealer. Certainly, the dealer was in a position where to "please" Beltone would be in his best business interests.

To cement its desire into reality, Beltone rewarded its dealers in such a way that single-line dealers were singled out for distinction. Coupling this with the loyalty idea and the "Beltone family" feeling, Beltone was able to realize distribution through single-line dealers.

41. Complaint counsel contend that Beltone "expressed, communicated or emphasized to their authorized dealers Beltone's business policy of dissuading, discouraging or prohibiting sales of competitive brands" of hearing aids by such dealers by means of "persuasion, pressure, harrassment, or coercion, or intimidation of such dealers to sell only Beltone products and not to sell other brands" (Compl. par. 11(4); *see* CSCPF at pp. 25–27) [54]

The record contains evidence of direct statements by HOFEs to dealers to the effect that they should not sell other brands. For example, Mr. Archer testified: "I was told on one occasion that as far as fitting or selling of Beltone instruments—let me put it this way. The question the way it came up was we have a problem with what happens if somebody comes in and we can't fit them with a Beltone? And the answer that I had gotten was to send them down the street. If we can't fit them with a Beltone—if I happen to have or if I knew of availability or had another instrument that was available that I knew would do that individual better, I was to sell them a Beltone if at all possible. . . . They would, as long as I was selling exclusively Beltones, then they would not come in with another person as a competitor of mine" (2315–16).

Mr. Benoit testified that at the beginning of his dealership HOFE Griffith said to him "that the reason why I was getting the franchise is because the previous franchise holder was carrying other brands and not making potential" (2098). Mr. Benoit added:

I went to some meetings in Chicago at the beginning of my dealership and at these

meetings we were briefed by Dave Barnow and during his discussions or his briefings he would mention that Beltone had chances to sell . . . their brands to Macy's and other department stores. However, they would not do this in loyalty to the dealers in their area, so therefore they expected the dealers to reciprocate by not selling other brands [2104].

Mr. Jeffrey testified that HOFE Griffith had said to him in essence that "he was displeased with this dealer for handling another aid and he was going to get on him about it as soon as he was up to Santa Barbara" (2441).

Mr. Mussleman testified that HOFE Sivek had "brought up the fact that . . . some Beltone dealers had . . . been toying around with other hearing aids other than Beltone; mentioned John Davis of Akron, Ohio, adjacent to me; and due to this fact they were going to fail or they were failing, and he certainly advised me not to take the same route and jeopardize my relationship with Beltone Electronics" (2580). **[55]**

Mr. Oldham testified that HOFE Ostott "mentioned there was another dealer that was handling another brand which was not authorized and he was going from my place to see him" (3067).

Mr. Peters testified that after he explained to HOFE Griffith that he had made a sale of an Otarion to a client he said to Mr. Griffith: "'Well, I either had to make the sale, Terry, or else send him down the street.' Terry looked at me, kind of grinned and said, 'You should have sent him down the street'" (2220).

Mr. Sable testified that HOFE Selznick "had come into my office and it was customary, every time he came in, he would walk around and inspect the various rooms and look it over. He walked to the area where we had kept our hearing aids, and he opened up the cabinet and looked it over, and he said, if we ever catch you selling another hearing aid, other than Beltone hearing aid, we will terminate your franchise. . . ." (1089).

Mr. Thomas testified that when HOFE Westmoreland discovered that he was selling hearing aids other than Beltone he said "'You know we can't have this'" (253).

The dealers' understood from such various conversations with their HOFEs and from other things that had been said to them by Beltone officials, that they were to carry and sell only Beltone hearing aids.

42. There is no question that before 1957 Beltone's authorized dealers were required to sell Beltone hearing aids exclusively in exclusive territories. Thereafter, according to respondents, the dealers were free to handle any brand of hearing aid they wanted and could sell Beltone hearing aids anywhere they wanted. Mr.

Elias, who became an authorized dealer in 1950 in Little Rock, and in 1956 became the authorized dealer in Memphis, said that the new franchise agreement "wasn't as binding as the old one" (15346). However, Mr. Elias also testified that he had never sold any other brand of hearing aid (15340, 15346). Mr. Jeter, who became the authorized Beltone dealer in Jackson, Mississippi, testified that a change in agreements was made in 1957 and that he was notified "that we no longer had a franchise agreement that it was simply . . . a working agreement or something to that effect" (15431, 15473). He further testified that "I have actually sold nothing except Beltone" (15424).

Mr. Galloway, who became a Beltone dealer in Rochester, New York, in 1949, testified that in 1957 he was notified by letter that he was no longer obligated to sell Beltones **[56]**exclusively and "that I could sell any hearing aids that I wanted to sell and they in turn could put other dealers or distributors in that particular area" (12068). He added that since 1957 he had "on occasion discussed . . . with numerous people, the general concept of that letter" (12133). Mr. Galloway sold only Beltones through his Beltone dealership (12077).

Mr. Jones, who became the Beltone dealer in Jefferson City in 1956 (15587–89) testified that the new agreement was no longer limiting as to territory or brand (15593). Yet Mr. Jones sold Beltones only: "[I] felt loyal to Beltone then and I still do" (15598).

Mr. Keel, who had been a Beltone dealer since 1950 in Columbus, Georgia (12786–87), testified that in 1957 "There was some changes made through FTC", and added that this had no effect on his agreement (12788). He further testified that he made no non-Beltone sales (12794; *but see* 13832–33).

Mr. Langham, who had been a Beltone dealer in Denver since 1954, testified that the agreement was altered and replaced in 1957 (14548–52). He further testified he sold only Beltones from 1957 to the day he testified (14549–56).

Mr. Miller who has been a Beltone dealer in Casper, Wyoming, since 1952, testified that his franchise agreement was changed in that he wasn't restricted to Beltone or an area (14966). He also testified that from 1952 to present he sold only Beltones (14967).

Mr. Morris, who has been a Beltone dealer in Reno since 1950 testified that he sold Beltones exclusively (13565), and didn't remember the 1957 change (13612). Mr. Partin who has been a Beltone dealer since 1952, testified that in 1957 there was a change made in his franchise operation and he could handle anything he

wanted to in hearing aids (16451). He also testified that he never sold anything but Beltone (16455–74).

Mr. Rice, who became a Beltone dealer in Kansas in 1948, testified that "the exclusive contract was replaced with a non-exclusive contract" in 1957 (16249). Yet from 1949 to present he sold only Beltone hearing aids (16250, 16267). [57]

Mr. Wofford, Sr., who at one time was Beltone's National Field Sales Manager (1955–1965) testified that the FTC proceeding "hardly changed our behavior at all except to write a new franchise. We literally dealt with our people on a trust us, trust you basis" (15808).

Jack Taylor, who had been a Beltone authorized dealer in Oakland, California from 1947 to 1971, testified that he sold Beltones exclusively until 1965 or 1966 (2002, 2015). He also testified that although the exclusive features were dropped from the agreement in 1957, "there were other things contrary to the [covering] letter" (1989–90).

43. The record shows that from 1960 to present there have been many innovations and improvements in hearing aids and that in the early 1970s Beltone was quite conservative in incorporating new features in its line (*see* 11130 Lipin; 16488–92 Partin; 11719 Lucas; 13711–13 Paul). Significantly, Beltone's "new breed" of instruments which started to become available to dealers in about 1972 when the Etude model was introduced (*see* 16389 Metcalfe; 13712 Paul), responded to many dealers' requests for new instruments (CX 541). With the advent of such features as ceramic microphones (CX 588; 16057 Kojis), directional microphones (CX 590, 592; *see* 16050–53 Kojis), automatic gain (volume) control ("AGC" or "AVC"), features which Beltone has since incorporated into its line (*see* CX 601–613), and the all-in-the-ear earmold aid, which Beltone does not manufacture, it would seem certain that an independent businessman would have purchased and carried instruments containing the new features that were not available through Beltone, unless he had an understanding or agreement that he could not do so under the terms of his relationship with Beltone (*see* CX 541, 546, 592, 594; 9045 Bain: ". . . my personal opinion is that Starkey is [a] darn good hearing aid, and Beltone ought to lean in that direction, because I think it is an area that they are missing people in").

It is significant that some Beltone dealers did sell some other brands that contained these new features when Beltone hearing aids did not (*see* 13962 Burak: Fidelity; 10966 Sloane; *see* Appendix "A", *infra; but see* 16493 Partin).

44. It is found as an inescapable fact that Beltone through its

dealer agreements as well as through its direct contacts with its dealers *required* them to carry Beltone hearing aids exclusively. [58]

About Dealers' Customers

45. As stated before, it is not disputed that Beltone appoints only one authorized dealer in any given area of primary marketing responsibility and that Beltone sells its products only to authorized dealers. And as noted, Article 1 of the dealer agreement provides that "BELTONE hereby appoints DEALER a retail DEALER . . ."

Most of the Beltone dealers presented by respondents testified that they had never made sales of new Beltone hearing aids to "competing non-Beltone" dealers. Many of these dealers testified that they not only had made no such sales but that they had never had any requests from such "competing non-Beltone" dealers (17048 Allen; 17385, 17440 Beattie; 12907 Borgeois; 14691 Bruner; 12437–38 Coppola; 17135, 17143–44 Durbin; 15341, 15350A Elias; 15498, 15502 Gilliam; 16154 Hudson; 15429 Jeter; 12339 Johnson; 15612 Jones; 12799 Keel; 14796 Kindopp; 18050–51 LaMontagne; 14552, 14562 Langham; 18295 Laster; 13213 Levy; 13575 Morris; 17297 Moses; 18119 Osnowitz; 16465–66, 16469 Partin; 13668 Paul; 13156 Pennet; 14336 Perisho; 15035 Pierson; 13454 Ribinowitz; 13402 Scheutzow; 9443 Selznick; 17968 Sturtz; 18215 Tabor; 15680 Pruitt; 13320 Wheeler; 15775 Wofford, Sr.; 15889 Azar).

Others testified that, although they had received requests, they chose not to sell new Beltones to "non-Beltone" dealers (15198 Bisel: "I have told them to send the people to me"; 15276 Byron: one request—"refused because of [the other dealer's] background"; 12095–96 Galloway: many requests, never sold—not sure it would be used properly; 17904–06 Glaspie: requesting dealer would not buy at the retail price; 11402, 11429 Gorlin: offered to do fitting; 12521 Hood: refused—"I don't wholesale"; 14896 Madsen: received first call in five years two weeks before testifying—didn't have item in stock; 17241 Martin: "on one or two occasions", didn't sell—"I want to know where my instruments are going"; 11047, 11023 Mattingly: wouldn't sell because "pretty proud of the fact that I sell Beltone hearing aids" . . . wanted to make sure it was fitted correctly; 11285 McCurdy: refused—"I have a responsibility for the instruments that are sold from my office"; 16340 Metcalfe: one request from a Kansas dealer, referred him to the local Beltone dealer,—"not in a position to provide service"; 14969 Miller: once last week, referred him to local dealer, "wouldn't be fair to [Beltone dealers in area]"; 15116 Proctor: one inquiry, never called [59]back; 16529–30, 16550B–C Rawlings: one request, refused, "not too sure how he was going to use it"—fear of complaint; 16273–74 Rice: a recent request, didn't sell—

"didn't like the way he operated his business"; 12661–62 St. James: "a couple of times"; 10090 Wofford, Jr.: refused to sell to competitors; 13814 Yarlott: refused to sell.).

Some dealers testified that they had made some sales of new Beltone hearing aids to non-Beltone dealers (13908–09 Burak: three requests, sold to two dealers[39]; 11940–41 Cato: once—refused all others because of service; 13019 Harlow: sold an Etude model; 12039–40 Hulser: sold once to old "Sonotone" friend—normally turns them down, not "fair to particular other Beltone dealer in the area"; 12736 Ivy: sold to another dealer on a "Rehab" referral; 11713 Lucas: "very rarely", sold two hearing aids to a Boston dealer; 13512, 13551 Magures: on one occasion sold to non-Beltone dealer in his area—"I would not sell to anyone out of my area"; 12237–38 McMilian: sold Beltone to his Zenith dealer-brother, and refused a subsequent request, referring them to local dealer; 17483–84 Mitsdarffer: sold once to Chicago dealer; 10944–45, 10969, 10999 Sloane: sold to non-Beltone dealers on two occasions, refused one request, "I don't like the way that man does business"; 15954–55 Tibault: sold to non-Beltone dealer in Pennsylvania; 11593, 11595–96 Ugoretz: sold one to a non-Beltone dealer at outset of his dealership, subsequent request but no sale after he set price at his salesman's cost instead of at wholesale).

The rest of the dealers presented by respondents testified generally as follows: Mr. Bain testified he had received requests for Beltones fron non-Beltone dealers and that he sold to at least two of them (9020, 9022, 9222–24). Mr. Culver testified that he has sold to non-Beltone dealers on four or five occasions (14050–51, 14086). Mr. Kauffman testified that he has had such requests and that he usually complies (9616, 9670–72). Mr. Lipin testified he has sold new Beltone hearing aids to other dealers (11118). Mr. Owenby testified he swaps with non-Beltone dealers per arrangement (14235). Mr. Toboken testified he didn't know whether his dealership had made sales to non-Beltone dealers (13100). **[60]**

Some of the former Beltone dealers presented by counsel supporting the complaint testified that they did not make sales of new Beltone hearing aids to "unauthorized" (non-Beltone) dealers (4314, 4378 Davis: He had many requests from "practically all" the non-Beltone dealers in his area, never sold to them; 2585 Musselman; 2241 Peters; 1225J–K G.G. Smith; 229 Thomas; 512 Wagner). Others did make such sales (2455–57 Jeffrey: sold two Beltone aids to Mr. Peters, a former Beltone dealer; 2524–25 Laird: sold aids to LaPera, a

[39] Mr. Burak sold Beltone parts to Mr. Conn, a former Beltone dealer located in San Diego, California (13929).

former Beltone dealer; 829–30 H. Smith: sold a Beltone to James Davis, a Zenith dealer; 1346 Thompson: sold a Beltone to a former consultant of his who was a Maico dealer).

In addition Mr. Davis testified that the reason why he did not sell Beltones to non-Beltone dealers was because he was in fear of cancellation. HOFE Sivek had told him he was to be a retail dealer only (4314, 4378). Mr. Jeffrey testified that Beltone dealers "weren't supposed to sell hearing aids to anybody but Beltone dealers or retail sales" (2456). Mr. Musselman testified that he was told not to sell to unauthorized dealers, that will "jeopardize your relationship" (2582). Mr. Peters testified he was not allowed to sell to non-Beltone, unauthorized, dealers and he didn't make such sales because he did not want to lose his franchise (2241). Mr. Sable testified that HOFE Selznick advised him that he couldn't sell to non-Beltone dealers (1095–96). Mr. G.G. Smith testified that it was not Beltone's policy to have its dealers wholesaling Beltone products (1225J). Mr. H. Smith testified that after his sale to the Zenith dealer he did not sell to other dealers because he did not want to get in trouble (835–36). HOFE Sauls advised him that such sales "wouldn't be tolerated, accepted, and not to do that again" (817). Mr. Thomas testified that he "wasn't to sell Beltone hearing aids to other competitive dealers" and he did not because he thought it "would possibly cost me my franchise" (229). Mr. Thompson testified that "it was understood that we weren't supposed to sell" to non-Beltone dealers (1345). Mr. Wagner also testified that it was his understanding that he was not supposed to make such sales (512).

Mr. Peterson testified that he sold new Beltone hearing aids to non-Beltone dealers on about ten occasions (2871) and that he bought some after termination of his dealership agreement (2873). Mr. Taylor and Mr. Benoit also testified that they had bought Beltones since their respective "terminations" (2197–98 Benoit; 2075 Taylor). **[61]**

Complaint counsel contend that Beltone prohibits its dealers from selling new Beltones to non-Beltone dealers and that such restriction fosters the exclusive territorial nature of the Beltone dealerships and the dealers practice of carrying only Beltones (*see* CSCPF pp. 127–128).

Respondents claim that dealers are free to sell new Beltones anywhere and to any purchaser and that the fact that they do not as a general rule is a result of their independent choices (Resp. Ans. Br. p. 8).

Each Beltone hearing aid is marked on its case with a serial number and Beltone retains a record of what instruments it sells to

its various authorized dealers. As already found (p. 30) Beltone requires its dealers to file a guarantee registration form containing the name and address of the purchaser of each particular numbered hearing aid. It is on the basis of this registration that Beltone issues directly to the purchaser the one-year factory guarantee of the instrument. Beltone does not guarantee an instrument unless the registration form is filed by an authorized Beltone dealer (2871–72 Peterson). In certain circumstances Beltone can and does trace serial numbers of instruments to ascertain the dealer to whom Beltone has sold the instrument and this information has been made available to its HOFEs and to other dealers (8445–48 Sauls; 2582 Musselman; 1095 Sable; 2498, 2524 Laird; 11713–14 Lucas; 2457 Jeffrey; CX 28Z188).

Some of the dealers or former dealers testified that when they sold Beltone hearing aids to non-Beltone dealers, they themselves would register the instrument to obtain the guarantee (*see* 2871–73 Peterson; 1348 Thompson; 9225 Bain; 11118 Lipin).

Moreover, as already found, Beltone will not make specification sheets or other technical information available to unauthorized dealers (*see* p. 35 *supra*). In addition Beltone will not repair a Beltone hearing aid submitted by an unauthorized dealer if the instrument is not under the one-year factory guarantee; if covered by guarantee, Beltone will make the necessary repairs, but will return the instrument directly to the user.[40] **[62]**

Article 8 provides:

> DEALER shall not, during the term hereof or thereafter, commit any act, make any representations, or advertise in any manner, which may adversely affect any BELTONE right or be detrimental to BELTONE's name and reputation, BELTONE Products, or any other BELTONE DEALER.

And as has been pointed out above (*supra,* p. 34), Beltone's concept of "loyalty" and "Beltone family" relates to any practice on the part of one dealer that would encroach on another dealer's area of primary marketing responsibility, namely selling Beltones at wholesale to a competing non-Beltone dealer located in another Beltone dealer's area.

On the record in this case it is found that respondents do *prohibit* their dealers from wholesaling Beltone hearing aids to non-Beltone dealers and accordingly restrict the potential customers to whom dealers may sell. Moreover, with Beltone's requirement that dealers make sales of new Beltones only in their respective areas of primary

[40] When an instrument is returned to the factory for repair the dealer retains possession of the accessories such as the ear mold and the tubing and battery (*see* 28Z138).

marketing responsibility, Beltone further restricts the potential customers to whom a dealer may sell.

About Non-Beltone Dealers

46. There is no dispute that respondents do not sell Beltone products to dealers who are not Beltone authorized dealers (*see* CX 156, 170, 184). As just found Beltone prohibits its dealers from selling new Beltone hearing aids to unauthorized dealers and through the use of serial numbers on the instruments, is able to trace any instrument so distributed. As previously found, respondents refuse to sell Beltone repair parts[41] or to provide schematics to unauthorized dealers or to persons engaged in the business of repairing or servicing hearing aids (*see* 4779–80, 4791–92 D. Barnow).

Moreover, it does not appear to be disputed that respondents refuse to supply to unauthorized dealers Beltone promotional and advertising materials or price lists, although under the circumstances it would be surprising if they have ever been asked to supply such materials. There is [63]some testimony that Beltone refuses to supply specifications or performance information to all dealers. But there is also testimony that certain specification or performance information, perhaps identical to that supplied to dealers, is made available to audiologists and hearing clinics as a matter of routine distribution (*see* 4792–93 D. Barnow).

As already found Beltone will not repair hearing aids out of warranty unless they are sent to the factory by an authorized dealer (p. 35, *supra*).

About Beltone's Use of Dealer's Customer Lists

47. Mr. Gorlin, the authorized Beltone dealer in Miami, Florida, testified that the list of Beltone users is the "most important part of the business . . . the biggest asset" (11458, 11469).[42]

Since early in its history Beltone has compiled the names of persons who are known to either wear Beltone hearing aids, or wear other brands of hearing aids, or are prospects for hearing aids. In recent years this information is stored in a "computer", and may be retrieved by county, city, or postal zone (zip code).

The source of names and addresses for this collection appears to be manifold. First, Beltone for many years has been the leader in national advertising designed to create a lead flow of high quality (*see* CX 6Z52, *in camera*). These "leads" are distributed to the

[41] There is also some testimony that Beltone's newest aids are so constructed that the component parts, especially the circuitry, are sealed in plastic and that dealers do not engage in major repair work on such aids (4779 D. Barnow; 11025 Mattingly; 9082 Bain: "sub-miniaturization", *but see* 2075–76 Taylor).

[42] *See also* 11367 McCurdy: user files "absolutely" a business asset; 1972 Taylor: "This is the most prized possession we have in our business, is the names and addresses of our clients" . . . the value of the business is the number of names.

authorized dealers who are *required* by the terms of their dealer agreement to call upon each "lead". The result of that call is required to be returned to Beltone on an "Inquiry Result Report" ("IRR") which is in the form of a "computer card". The dealer is supposed to designate on that card whether the lead was sold a hearing aid, whether the lead was already a user of Beltone hearing aids or of another brand, and whether the lead, if not a hearing aid user, was a prospect for a hearing aid. If the lead is a prospect or user, his/her name and address is added to Beltone's computerized list (*see* CX 286B; 3653–56, 3689–90 Rosen).

The second source of names for Beltone's computer collection is the guaranty registration forms on all new **[64]**Beltone hearing aids sold and fitted, that the dealer is required to submit to Beltone. The dealers may have made the initial contact with the customer in one of many ways such as through (1) a Beltone lead originating from national advertising; (2) a "lead" supplied by another dealer either directly or through Beltone; (3) the dealer's own promotional and advertising efforts, which are "co-oped" by Beltone; (4) the dealer's own efforts not "co-oped" by Beltone; (5) referrals from doctors or hearing aid clinics; and (6) referral from satisfied users or other clients.

A third source of input is the names of prospects (not Beltone users) that may be obtained by the dealers. The record shows that as a general rule, Beltone dealers voluntarily submit the names of "leads" (prospects) that they have secured on their own efforts, but have not sold a hearing aid, to Beltone for inclusion in the "computer".[43]

Beltone uses this computerized collection of names and addresses for many purposes. First, Beltone periodically mails a Beltone newsletter to all Beltone users. Second, Beltone will send at the request of the dealer a service center bulletin to a particular dealer's customers, coordinating this mailing with the dealer's promotions. Third, Beltone will make special promotional mailings at the request of a dealer to all of the customer users or prospects who reside in his area of primary marketing responsibility. Fourth, Beltone will supply up-to-date printouts or address labels to the dealer upon request. Fifth, Beltone supplies the new Beltone dealer with the names of all users and prospects in his appointed area and, generally mails a "Dear Friend" letter to those users and prospects announcing the appointment of a new dealer (2343 Archer; 4305 Davis; 2510–

[43] There is some testimony that in order to obtain cooperative advertising credit for a dealer's promotional program such as participation in a fair booth, it is necessary that the dealer submit to Beltone the "leads" obtained through said promotion (408 Thomas).

12 Laird; 2232–34 Peters; 2867 Peterson; 659 Plyler; 1219–20 G.G. Smith; 1973 Taylor; 510 Wagner; 1589 Ziegler).[44] **[65**]Finally, during a period of approximately four years, Beltone rented lists of names of users and prospects to companies outside the hearing aid industry, such as vitamin companies, wig manufacturers and insurance companies. The users and prospects received promotional mailings from such companies (4965–66 D. Barnow).[45] This rental practice, ostensibly to supplement the fund from which Beltone paid for national advertising, was engaged in without the permission of the dealer or the user. In fact most of the dealer witnesses who testified in this case did not know that Beltone had rented these names until asked various questions on the witness stand.

The record in this case shows that when dealers sell their businesses, the user list and files[46] are usually considered to be part of the assets, and in certain instances the amount of consideration was calculated on the number of user names in the selling dealer's business files (11407 Gorlin; 16193 Hudson; 9663 Kauffman; 14772 Kindopp; 18089 LaMontagne; 18279 Laster; 11678 Lucas; 11308 McCurdy; 13143 Pennet; 13372–73 Scheutzow; 12650 St. James; 2163 Benoit; 4350 Davis; 1701–02 Lathrop; 2695 Mussleman; 656 Plyler; 348 Thomas).

48. Complaint counsel contend that actually respondents appropriate and use for their own purposes the names and addresses of their dealers' customers.

Respondents, on the other hand, contend that these names are rightfully their property and that they can use them for any legitimate business purpose, including the rental thereof to firms outside the hearing aid industry.

On this record it appears that Beltone treats the customers of its authorized dealers as customers of Beltone. But if the authorized dealer is an independent businessman as Beltone claims (and as stated in the dealer agreement and which is found as fact in this case) no such relationship can exist between Beltone and the Beltone user. **[66]**

The requirement that the user name and address be submitted to Beltone for warranty purposes should limit Beltone's use of the name and address to that purpose. If other names, including leads, are submitted to Beltone for mailing purposes their use should be

[44] Some of these "Dear Friend" letters announcing a new dealer also indicated that the old dealer was no longer in business contrary to fact, or that he was no longer an authorized dealer (2130, 2132–33 Benoit; 1589 Ziegler; CX 395).

[45] *See* CX 211–269, 271–306.

[46] There is a significant difference between a user list and a user file in that the former is merely a name and address whereas the file usually consists of all information concerning the user customer, the hearing test results, and the fitting.

limited to that purpose. Other uses, such as delivering them to succeeding dealers when the former authorized dealer is still a hearing aid dealer in the same general locale, or renting the lists, is found to be a misappropriation of the dealers' property. This is so notwithstanding the clause in the dealer agreement that provides that upon termination the dealer is to return the names and addresses to Beltone (*see* Article 18 of 1971 form agreement (CX 398)).[47]

Moreover, the possibility that Beltone could deliver a dealer's customers' names to another dealer gives Beltone coercive power over the dealer's practices with respect to brands sold, the geographic area sold in, and the customers sold to, as well as any other of his practices whether prescribed in the dealer's agreement or not, relating to the conduct of the dealer's business. The percentage of sales made by the dealer from Beltone leads is relatively small, ranging from 15 to 25 percent. The greatest number of sales apparently come from repeat business with users[48] and referrals from satisfied users (11564 Ugoretz).

There is a certain degree of brand loyalty practiced by customers, which is cultivated by Beltone in its periodic mailings, as well as in its "Beltone family" approach.

About Terminations of Beltone Dealers

49. The dealer agreement provides in pertinent part (CX 401, Art. 15): **[67]**

> Either party hereto may terminate this Agreement, at any time, upon at least thirty (30) days prior written notice to the other party. However, upon violation of any provision of this Agreement by either such party, the other party shall have the right to terminate the Agreement, immediately, by written notice . . . .

Significantly, most of the dealer-witnesses were well aware of the termination provision of the dealer agreement (17063 Allen; 17390 Beattie: "for . . . gross incompetancy or malfeasance . . . [I]f I am not ethical"; 12923–24 Borgeois; 14711 Bruner; 13941 Burak; 15297 Byron; 12446 Coppola; 14061–62 Culver; 17147 Durbin; 15353 Elias; 12097 Galloway; 17911 Glaspie; 11452 Gorlin; 12522 Hood; 16158 Hudson; 12040 Hulser; 12738 Ivy; 12339 Johnson; 15617 Jones; 12803 Keel; 14812 Kindopp; 18051 LaMontagne; 14568–69 Langham; 18308 Laster: "if there were a great number of complaints . . . and you weren't conducting your business ethically"; 13219–20 Levy; 11686

[47] "Upon termination of this Agreement, however occurring, any BELTONE property, such as BELTONE Manuals, operating forms supplied by BELTONE, leads, user names, and equipment and other articles in DEALER's possession, on loan, rental, or license from BELTONE, shall be returned to BELTONE immediately."

[48] *See* CX 522. It is estimated that a hearing aid wearer will purchase a new instrument every 3.4 years (CX 1B).

Lucas; 14943 Madsen; 13522 Margures; 11039 Mattingly; 11263, 11343 McCurdy: "if you violate a provision of your franchise agreement"; 12207–08, 12244 McMilian: "only negative thing [about Beltone dealer arrangement] would be either termination clause"; 14979 Miller; 13578 Moses; 18124 Osnowitz; 14252 Owenby; 13673 Paul; 13156 Pennet; 16533 Rawlings; 13449 Ribinowitz; 16279 Rice: "abusing the Beltone concept or any concept"; 13378–9 Scheutzow; 10931 Sloane; 1266–67 St. James; 17974–75 Sturtz; 13104 Tabokin; 18219 Tabor: if she "did something awful"; 15966 Tibault; 15683 Pruitt; 11562 Ugoretz; 9846–47 Wofford, Jr.; 15782 Wofford, Sr.; 13831 Yarlott; *but see* 15895 Azar: didn't know if there was a provision; 16345 Metcalfe: "sure there are").

Several dealers testified that they had discussed the termination provision with their HOFEs (11452 Gorlin: with Sauls; 16489–90 Partin: Hilpert "threatened to cancel my dealership . . . back in 1959 or 60").

As heretofore found, about 12 to 15 Beltone dealers are terminated each year by Beltone (5842–43 Shymanik; 6328 D. Smith).

In this connection, the HOFEs are instructed in their HOFE Procedural Manual as follows (RX 20Z): [68]

The best way to assure that neither *you* nor the *company* are suspected of an *improper* pattern of behavior in terminations is to create and maintain a file of *written* communications relative to *every* termination. This file eventually will show the many times you have discussed with the Dealer his failures and derelictions; the many offers of help which you extended to him to solve his problems; his attitudes and responses to your discussions and offers; and the resultant necessity, for the best interests of the company (and many times of the Dealer, himself), to terminate his Dealer Agreement. Of course, we all hope that during the course of such discussions and correspondence the Dealer's problems *can be solved* and his business developed into a profitable and successful Beltone Dealership. But, in the event that happy result cannot be reached, and termination must be accomplished, there will be a *written record*—a complete written documentation—of our *sincere* attempts to *help* the Dealer, showing the *full* justification for the resultant termination [Emphasis in original].

As already found when an authorized Beltone dealer was not purchasing new hearing aids from Beltone in an amount that approximated the dealer's "potential," he was contacted by Beltone. It was the custom of the Regional Manager to discuss "adequate market penetration" with the dealer and attempt to get him to agree to certain programs designed to increase his sales of new Beltone hearing aids. Foremost in such a program was the recruiting and hiring of consultants (*see* CX 38, 40, 43, 70, 71, 79, 452, 471, 517, 548). One of the primary responsibilities of the HOFE was the ongoing program designed to train these consultants, employees of the dealers, in the selling and fitting techniques that Beltone had found

to be most productive of sales. Other promotions designed to obtain leads of prospects by the dealer were also suggested by the Regional Manager.

If such efforts did not result in what the HOFE considered adequate market penetration, or if the dealer would not cooperate in implementing the suggested programs, including the development of a "manpower organization", the HOFE would state that anything less that 100 percent potential was unsatisfactory[49] and that unless potential [69]was obtained Beltone would have to terminate the dealer (6115–16 D. Smith; *see* 5134 D. Barnow; *see also* RX 20Z; CX 50, 67, 72, 82, 473, 492, 501, 506).

Usually those dealers who were not financially successful were in arrears in their accounts with Beltone. The reasons given for terminating a dealer were several. It was considered a reason when a dealer, after Beltone had made every reasonable effort to try to help him, was selling so few Beltone hearing aids in the area of primary marketing responsibility that Beltone felt it couldn't continue to do business with him[50] (*see* CX 137, 190, 502; 6143 D. Smith).

However, termination was never taken lightly. It is hard to install a new dealer and dealer inductions constitute a tremendous investment in time and effort of the Regional Manager (6143, 6195, 6328 D. Smith).

50. The record shows that a dealer's sales of other brand hearing aid instruments was a factor that would be taken into consideration in terminations. Ex-HOFE Griffith explained (1804):

> If you have a dealer who in the company's mind is disloyal, if there are other grounds for termination such as poor sales performance, that dealer would be more apt to be terminated if he were handling a competitive hearing aid than had he not been handling a competitive hearing aid.

Griffith made a similar statement to a Beltone dealer (*see* 1634 Lathrop). HOFE Selznick told Sable "we know it is illegal for us to [terminate] on that basis, but we will find a reason" (1089, 1154 Sable).

In 1973 Beltone dealer Davis was terminated (RX 40A–B). In 1972 HOFE Sivek asked Davis why he was not selling more Beltone hearing aids and Davis replied he was selling other brands (8780–85). Sivek told Davis that unless he changed his policies with respect to

[49] *See* CX 33, 41, 63, 77 (HOFE Sauls), CX 39, 53, 54, 70, 80 (HOFE Schaller), CX 42 (HOFE Griffith), CX 47, 82 (HOFE Childers), CX 48 (Westmoreland), CX 49, (HOFE Nelson), CX 50, 504, 505 (HOFE Jones), CX 67 (D. Smith, Director of Marketing), CX 71, 471 (HOFE Selznick), CX 72 (HOFE Shymanik), CX 364 (HOFE Klein), CX 379 (HOFE Freeman), CX 492, 500 (HOFE Nealon).

[50] Additional grounds for termination were failure to return IRR cards (CX 137, 317); failure to submit guarantee registration cards (CX 317); failure to maintain a current account (CX 317, 503) or alleged unethical practices (CX 317).

other brands, Davis' lead flow would be cut and he would be replaced (4295 Davis; *see also* 2586 Musselman). Davis' lead flow was drastically reduced, [70]and he was terminated (4295 Davis; 8798–8808, 8784 Sivek; RX 41A–B). Davis was terminated on the grounds of low production (RX 40A–C).

In 1971, Beltone terminated Beltone dealer Taylor on the grounds of inadequate market penetration (10047–48 Wofford, Jr.; 1945 Taylor). HOFE Griffith had attempted to persuade Taylor not to sell other brands (1767 Griffith; 1950, 2015 Taylor; *see* 9922–23 Wofford, Jr.). D. Barnow also discussed with Taylor his sale of other brands and said: ". . . you really give me no choice. We could either cancel you or open another office down the street. . ." (1955 Taylor). Shortly before Taylor's termination D. Barnow noted that Taylor "still continued to sell multi-line hearing aids" (1955 Taylor).

Dealer Archer, who was terminated by Beltone in 1967, had, before his appointment as an authorized Beltone dealer, been a multi-line dealer. He was told by his HOFE Fogg to dispose of his existing stock of other brands and to handle Beltone only (2359–60 Archer). After he opened another office outside his "area" in which he sold another brand and after he was admonished for such sales he was terminated for refusal to return IRR cards and file guarantee registrations (1856–58 Griffith; 2317–22, 2382–84 Archer; 1640–43, 1688–89 Lathrop; *see* RX 51).

In 1970, Beltone terminated its dealer H. Smith on the grounds of customer complaints and failure to send IRR cards and guarantee registrations to Beltone (*see* CX 317 A–B). For some time prior to termination he was known by Beltone and other Beltone dealers to be selling other brands (8464–65 Sauls; 632–34, 717 Plyler; 502–03 Wagner), and HOFE Sauls and Division Manager Shymanik both discussed H. Smith's lack of loyalty (774–79, 954, 782–792, 795–96 H. Smith). Beltone, thereafter, accused H. Smith of selling Zeniths representing them as Beltones (6888–93 Matoba; 5881 D. Smith). Shymanik told dealer Wagner that he had just cancelled H. Smith for handling other brands (502–03).

In addition to termination of dealers who sold other brands, Beltone received the resignation of dealer Ziegler after he was confronted by HOFE Selznick and Shymanik on the subject of other brands (*see* 1434–39, 1554–62 Ziegler; CX 387). Dealer Johnson, who was at one time a Beltone Division Manager, sold his business to dealer Benoit after [71]Beltone threatened his termination for low production. Johnson was openly engaged in the sale of other brands (1785, 1803–08 Griffith; 2098–2101 Benoit; 10030, 10162 Wofford, Jr.).

Beltone also terminated several dealers after it learned that they had "transshipped" or "wholesaled" new Beltone hearing aids to ex-Beltone dealers. Laird was terminated after his sales to LePera were traced by serial number and shortly after D. Smith telephoned and complained about such transshipment (2498, 2501 Laird; 1810–13 Griffith; 6446 D. Smith). Shortly after dealer Jeffrey's aids transshipped to ex-Beltone dealer Peters were traced, he was terminated (10669 Schaller; 2242–47, 2298–2301 Peters; 2456–58 Jeffrey).

Moreover, dealers Taylor, Archer and Plyler were reluctant to send in names of their customers to Beltone because they felt their customer names were their confidential property and didn't want them turned over to another dealer (1972–73 Taylor; 2337 Archer; 656 Plyler; 4343–44 Davis; 10058–60 Wofford, Jr.). Nonsubmission of names was a basis for termination of dealers (RX 20Z; 10055–58, 10060 Wofford, Jr.).

Finally, sales in another dealer's area was a constant source of friction between dealer Musselman, his neighboring Beltone dealer Settles, and several Beltone HOFEs and company officials. Difficulties engendered between Beltone dealers in Pennsylvania and the state officials resulting from Musselman's extra-territorial activities arose before Musselman was terminated on the grounds that he had stopped doing business with Beltone (*see* CX 181, 330 RX 42). Actually, Beltone had refused to sell Beltone instruments to Musselman except on a cash-with-order basis (*see* 8852, 8915 Sivek).

51. Beltone's right to terminate the dealer agreement on short notice with or without cause is inherently coercive and unreasonable. The Beltone dealer, pursuant to the other provisions of the dealer agreement and other requirements imposed by Beltone, is committed to a close identification with the Beltone name. His trade style is "Beltone Hearing Aid Service", and most of his customers are Beltone users. His business telephone is usually listed under the Beltone name, and his testing and fitting equipment provided on loan or rental by Beltone (4715–16 D. Barnow). In training consultants, as well as in setting up an office and a service center program, the dealer makes quite a monetary investment in his hearing aid business. **[72]**

Upon termination the dealer stands in a position to lose his business investment. Pursuant to the provisions of the dealer agreement he must cease *all* use of the Beltone name including the use of the telephone listed thereunder in the telephone directory. In addition, all loan and rental equipment must be returned to Beltone. Beltone has a list of the dealer's Beltone customer-users, which it can make available to a successor dealer who would have the right to use

the Beltone name including the trade style Beltone Hearing Aid Service (8915–20 Sivek).

In its business relationship with dealers, Beltone overtly has used the threat of termination to effect the business policies challenged in this proceeding. In addition, the dealer's actions in adhering to those policies must also be viewed in light of Beltone's right to terminate. The inherently coercive threat of termination is found to have a substantial bearing on the dealer's acquiesence to conduct his business in line with Beltone's philosophies, which have resulted in the anticompetitive behavior challenged in this proceeding.

About Post-Termination Matters

Beltone's form dealer agreement contains several provisions covering post-termination activities of an ex-dealer. For example, Article 16 provides in pertinent part (CX 401 B):

. . . BELTONE shall have the option, at the time of notice of termination of this Agreement by either party or within thirty (30) days after said notice, of purchasing from DEALER at BELTONE's then-current prices, any unsold, unused, BELTONE Products which DEALER may have on hand.

Beltone exercises this option (2385–86 Archer; 2081 Taylor; RX 40 B; RX 42 B; CX 503 B).

Beltone's form dealer agreement also contains a post-termination ban on using the "Beltone" name in any advertising. In pertinent part, Article 12 provides (CX 401 B):

. . . With regard to advertising, DEALER shall not advertise, after termination of this agreement any BELTONE Products, new or used, or BELTONE Repair service. [73]

Beltone has enforced this provision (CX 352, 495).[51] After Ziegler's resignation, Ziegler was visited by Mr. Wilheim, Beltone's attorney, about a sign in Ziegler's window that read (CX 389; Phy. Exh. 1):

CLEARANCE SALE
RECONDITIONED AIDS

MAICO	**BELTONE**	**SONOTONE**
ZENITH		
ELECTONES	$20.00 up	
AND MORE		
ENDS APRIL 30		

Reference was also made to a letter Ziegler had sent to his customers in which the word "Beltone" appeared, and to an equipment bag

[51] In addition Beltone's attorney wrote to terminated dealers warning them against doing anything that may be detrimental to the good name of Beltone, as provided in the dealer agreement (*see* Art. 8, CX 401).

found in Ziegler's shop containing a faded reference to Beltone (CX 388). Ziegler testified (1622):

> . . . if we [Phil and Greg Ziegler] didn't stop using that name in any way whatsoever . . . if one thing was ever found in our office, with the word Beltone, on it, that you [Beltone's attorney] would sue us in federal court . . . in such a way that we would never be able to go in the hearing aid business again.[52]

Ziegler further testified that after this incident he stopped using the Beltone name (1500–01).[53]

Most Beltone dealers trade under the Beltone name using styles such as Beltone Hearing Aid Service.[54] Beltone encourages the use of such a business name (CX 28Z120; [74]4769 D. Barnow) and cooperative advertising credit is granted towards the purchase of outside display signs carrying such a name (CX 28Z124–Z125). As dealer Wofford, Sr. explained, the Beltone dealer wants to use the Beltone name in his trade style (*see* 15805). The dealer agreement, however, reserves absolutely all rights to the Beltone name to Beltone, and on termination, the ex-dealer must cease using such a name style (*see* Art. 12, CX 401 B). The replacement dealer, however, can use the same trade style, and he is usually located in the vicinity of the ex-dealer (2175 Benoit; 8836 Sivek; 7263, 7266–67 Westmoreland; 9468 Selznick).

In addition, as found above (Finding 33, *supra*) Beltone refused to make factory repairs on out-of-warranty aids sent in by ex-Beltone dealers, and although it made in-warranty repairs, it returned the repaired instrument to the user along with a notice that the new authorized dealer was available to service the user.

Appendix "A" to the dealer agreement (*see* Appendix B, *infra*) contains three letters signed in blank by the dealer at the outset of his dealership. The first letter, addressed to the "Office of the Building" directs the addressee to "immediately cancel and remove" at the dealer's expense all listings and signs that include the name "Beltone".

The second letter advises the addressee that the dealer no longer has the right to use the name "Beltone" in any advertisement or in any media in contact with the public.

The third letter, addressed to the "Telephone Company" in addition to relinquishing the right to the name Beltone in all directory listings, directs that the Telephone Company transfer

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[52] This testimony was given during Mr. Wilheim's persistent cross-examination of Ziegler (1620–22).

[53] *See* 1980 Taylor; 11487–92 Gorlin; CX 514, 515.

[54] Article 2 of the form dealer agreement provides in pertinent part (CX 401 A): "BELTONE grants to DEALER the right during the term hereof, to use the trademark, 'BELTONE,' only in a manner approved, in writing, by BELTONE and such use shall cease within thirty (30) days of DEALER's receipt of written notice from BELTONE. DEALER shall never incorporate under any trade name or style using said trandemark. . . ."

telephone service to Beltone Electronics Corporation or if "such transfer can not be accomplished, we direct that such service be cancelled immediately."

There is no evidence that Beltone ever used the third letter to cancel an ex-dealer's telephone number. But the power to accomplish this was assumed at the outset of the dealership (*see* 14909–91 Ziegler).

About the Effects of Beltone's Practices on Competition, Dealers and Users

53. It is further found that respondents' practices as found above actually have the effect of, or have the tendency and capacity of, hindering, suppressing or eliminating competition as alleged in the nine subparagraphs of paragraph twelve of the complaint (*see supra* at p. 7). **[75]**

54. Having found that respondents require their authorized dealers to handle only Beltone hearing aids in their retail sales of new hearing aids, a requirement that most Beltone dealers obey, it follows that competing manufacturers are foreclosed by respondents' practices from selling to these dealers. In fact, representatives of competing manufacturers testified that they were unable to sell their hearing aids to Beltone dealers (3917–20 Skadegard; 4260–62 Sturtz; 3731–33 Saad). The record shows that the independent hearing aid dealers are the principal source through which consumers obtain hearing aids. Accordingly, respondents' practices do, and have the tendency and capacity to, hinder and suppress competition for the custom of Beltone dealers.

55. Having found that respondents require that their authorized dealers sell Beltone products only within a designated area, that they appoint only one dealer in each area, they sell Beltone products only to their authorized dealers, and that their dealers do not solicit business outside their designated area, it follows that competition among dealers selling Beltone products has been eliminated as a result of respondents' practices.

56. In addition to restricting their dealers to sales within designated areas, respondents also prohibit them from wholesaling or transshipping new Beltone hearing aids to non-Beltone dealers. This deprives the Beltone dealers of their freedom to select their customers.

57. By requiring their dealers to submit guarantee registration forms for all new Beltone hearing aids sold, a form that contains among other information the name and address of the customer, and by subsequently retaining a list of said names and addresses that may be, and in certain cases has been, delivered over to another

Beltone dealer or rented to firms in businesses other than the hearing aid business, respondents have deprived their dealers of freedom to maintain a confidential list of their customers, which, the record shows, is one of the most valuable assets of a retail hearing aid dealer's business.

58. By preventing Beltone dealers from handling other brands of new hearing aids, respondents prevent their dealers from competing with other dealers in the sale of non-Beltone hearing aids. **[76]**

59. By requiring their dealers to handle only Beltone hearing aids in the retail of new hearing aids and by restricting sales to Beltone "leads" in Beltone hearing aids, respondents have deprived their dealers of their freedom to act in the best interest of the hearing impaired public. The record shows that from time to time Beltone did not have in its line certain features found in competitive brands, features that were subsequently incorporated into Beltone's line, and features that were best suited for some prospective users' hearing problems. In addition, the record shows that certain competitive hearing aids of quality comparable to Beltone products cost less at wholesale and were retailed at a lower price than the Beltone hearing aid. Because fitting the proper hearing aid is admittedly an art wherein the subjective response of the customer is involved, restriction on the aids a dealer carries has the tendency and capacity to deprive the dealer of freedom to act in the best interest of the hearing impaired public. In those situations where a dealer might otherwise be inclined to fit a competing brand, the "potential" system might affect his choice of the instrument to fit on a prospective user. This, in addition, may have the tendency and capacity to restrict a dealer's freedom to act in the best interest of the hearing impaired public.[55]

60. On the other hand these restrictions on the dealers have, for the same reasons set forth in the preceding paragraph, the tendency and capacity to deprive the consumers of their right to fair and impartial recommendations from dealers in their selection of hearing aids for the alleviation of their hearing impairment.

61. It follows that consumers have been deprived of the benefits of free competition. In addition to restraints on the fair and impartial recommendations of dealers as to the best fittings available, respondents practices do, and have the tendency and capacity to, hinder and suppress price competition among Beltone dealers,

[55] It should be noted that respondents' refusal to sell to nonauthorized dealers and their restrictions on Beltone dealers' wholesaling or transshipping Beltone hearing aids to non-Beltone dealers, has the tendency and capacity to deprive those non-Beltone dealers of their freedom to act in the best interests of the hearing impaired public and deprive the consumers of their right to a fair and impartial recommendation from non-Beltone dealers in the selection of hearing aids for the alleviation of their hearing impairment (*see* CX 162, 164, 169).

and price competition among different brands of hearing aids. The record shows that most Beltone dealers set the retail prices according to their overhead and other expenses and profit, without [77]taking into consideration the prices of competing brands or the prices on Beltone hearing aids offered by other Beltone dealers. In addition, where a dealer carries only one line, the prospective consumer does not have the benefit of a choice of comparable instruments according to price. The hearing impaired public, of which the substantial majority are over 60 years of age, is not likely to engage in comparison shopping. The record shows that Beltone dealers did not advertise the retail prices of Beltone hearing aids.

62. Finally, respondents' refusal to sell Beltone repair parts to anyone except Beltone authorized dealers may have the tendency and capacity to deprive others engaged in repairing and servicing hearing aids of competition with respondents or their authorized dealers in the repair and service of Beltone hearing aids.

Although the findings as to the effects upon competition, dealers and the public coincide to some extent with the opinion given by Dr. Bruce Owen (4537–42), his testimony was not afforded any probative weight. He had no first hand knowledge of the hearing aid industry (4506) and he based his conclusions only on selected portions of the record comprising the case-in-chief. The opinion testimony of Dr. Leon Moses (17677–856), who also had no advance knowledge of the hearing aid industry (17569), has been considered and rejected, in that it is in part based upon data not made available to counsel supporting the complaint or the Administrative Law Judge. Moreover, most of the basic assumptions of Dr. Moses are contrary to the facts demonstrated on the record considered as a whole and the reasonable inferences that may be drawn therefrom.

DISCUSSION

Jurisdiction

Beltone engages in substantial business activities "in commerce" as "commerce" is defined in the Federal Trade Commission Act. A manufacturer that distributes its goods across state lines is subject to Commission jurisdiction, regardless of the exact point that title thereto passes. *Carter Carburetor Corp. v. Federal Trade Commission,* 112 F.2d 722, 730 (8th Cir. 1940). All essential elements of agreements or understandings relating to such interstate transactions are also "in commerce" within the meaning of the Act. *See United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533 (1944); *Holland*

Furnace Corp. v. Federal Trade Commission, 269 F.2d 203 (7th Cir. 1959), *cert. denied,* 361 U.S. 932. [78]

Insofar as the individual respondents were the top policy-making executives of a close family held and run company engaged "in commerce", they are also subject to the Commission's jurisdiction. *See e.g., Fred Meyer, Inc. v. Federal Trade Commission,* 359 F.2d 351 (9th Cir. 1966), *reversed on other grounds,* 390 U.S. 341 (1968); *Surf Sales Co. v. Federal Trade Commission,* 259 F.2d 744 (7th Cir. 1958).

Individual Responsibility For the Acts of the Corporation

The individual respondents, in their individual capacities, are responsible for the acts and practices of the corporation that are challenged in this proceeding. The record is clear that the respondents, individually and collectively, developed the sales practices and methods of competition which are challenged in the complaint, and at all times had the power to control, and did supervise, the said acts and practices. The individual respondents' contention that they are not engaged in the business of selling and distributing hearing aids is of no moment in a case brought under Section 5 of the Federal Trade Commission Act. The statute goes to the acts and practices and the methods of competition involved.

Responsibility For the Acts and Practices of Employees

Respondents do not argue that any act or practice of Beltone employees, especially the HOFEs in their contacts with authorized Beltone dealers, is not the responsibility of Beltone or the individual respondents. Unlike the usual situation where salesmen may be independent contractors, HOFEs are admittedly Beltone employees whose offices are technically located in Chicago at the plant. Their activities are closely monitored by the individual respondents and other officers and officials of Beltone. Under the circumstances, Beltone and the individual respondents were fully aware of their activities. Moreover, the specific instructions the HOFEs received in their meetings with the individual respondents and in the manuals or procedural guides prepared under the authority or supervision of the individual respondents, clearly demonstrate that their actions were approved and adopted as the actions of respondents.

Section 5 of the Federal Trade Commission Act and Respondents' Acts and Practices and Methods of Competition

At the outset, it should be emphasized that this case arises under the provisions of Section 5 of the Federal Trade Commission Act. Unlike the so-called "antitrust" statutes that regulate conduct that has been shown to have a specific result, under Section 5 conduct not heretofore declared illegal may be defined and stopped by an order

[79]to cease and desist. *See Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972). This view is not unique; the legislative purpose in creating the Federal Trade Commission was to entrust in an expert body the task of defining those practices in their incipiency, which, if left unregulated, probably would result in a substantial lessening of competition or in a monoply. Of course the entire concept of the antitrust laws in particular is to keep free those natural competitive forces that insure to the consumer the best possible product at the lowest possible price. The allegations of the complaint in this case should be measured with this view in mind, and not necessarily by the rigid molds of cases brought under more specific statutes such as the Clayton Act and the Sherman Act.

Territorial Restraints

Although a manufacturer (seller) may select his customers in such a way that, as a result, they do not compete in the resale of his products, any collateral restriction imposed on the buyer by the seller relating to the territorial area in which, or to the customers to whom, the buyer makes resales, is suspect as being an incipient threat to free competition. In *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 382 (1967), the Supreme Court held that vertically imposed territorial restraints were illegal under the Sherman Act without regard to whether the understandings are expressed or silent:

> Once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or persons to whom the product may be transferred—whether by explicit agreement or by silent combination or understanding with his vendee—is a *per se* violation of §1 of the Sherman Act.

Respondents argue that the dealers are independent businessmen who make their own decisions as to how to conduct their businesses, that there is nothing in the dealer agreement that requires that they sell only in their respective designated areas and that there is no testimony that respondents have informed authorized dealers that "you must stay in that area of marketing responsibility or your dealership agreement with Beltone will be terminated" (Resp. Ans. Br., par. 16). This is [80]the extent of their defense to the charges of the complaint; nowhere in their proposed findings or answering brief do they discuss this case in the light of the public policy as announced in the cases on the subject of exclusive territories.

But there can be no doubt from a reading of the dealer agreement and Beltone's announced policy of not establishing more than one Beltone authorized dealer in a particular area (designated), that it is Beltone's wish that its dealers have territorial exclusivity. Fulfill-

ment of this wish would be defeated if in fact dealers did engage in extra-territorial sales. From the dealers' actions, first, in not soliciting extra-territorial business, second, in adopting respondents' suggestion of considering that they must actually service the customers to whom they sell, and third, in considering their own areas to be exclusive, it is clear that both respondents and the dealers consider and intend that the territories be exclusive.

Actually, the Beltone dealers had little choice except to adhere to Beltone's wishes in the matter. Their dealer agreements were actually in existence at Beltone's sufference and could be terminated at any time. The parties to such an agreement, where the dealer has everything at stake, and Beltone not very much, are not equal bargainers.

Accordingly, such an understanding, whether by explicit agreement or by silent combination, which results in territorial restrictions that contravene the policies of Section 1 of the Sherman Act, violates Section 5 of the Federal Trade Commission Act. Clearly, respondents have accomplished actual territorial exclusivity for their dealers and all the resulting anticompetitive effects and benefits concomitent therewith.

Product Restraints

In *Federal Trade Commission v. Brown Shoe Co.,* 384 U.S. 316, 321 (1966) the Supreme Court held that a manufacturer of shoes engaged in conduct which could be prohibited under Section 5 of the Federal Trade Commission Act when it engaged in a program whereby its retailers were required to concentrate on reselling the manufacturer's line of products and to refrain from carrying conflicting lines. The Court said that such conduct "obviously conflicts with the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act." [81]

Respondents argue that their dealers are independent businessmen "in the fullest sense of that phrase" (Resp. Ans. Br. par. 12), that each and every dealer presented by respondent testified that he or she, operating a retail hearing aid business as an independent businessman, sold whatever brand or brands of hearing aids he desired to offer for sale (*Ibid.*), and that the dealer agreement did not require that a dealer handle Beltone products exclusively (*Id.* at par. 10).

As pointed out in the discussion about territorial restrictions, Beltone's dealers, although technically independent businessmen and women in that they are not agents or employees of Beltone, are not independent of Beltone insofar as making business decisions. Their business choices to carry only Beltone hearing aids are made

in response to Beltone's announced policy of single-line merchandising, the requirements of the dealer agreement that a dealer promote Beltones, achieve potential and sell only Beltones to Beltone "leads", together with the actions overtly taken by Beltone to encourage dealers to be single-line dealers, including pressure from HOFEs to sell only Beltones, and threats of termination. In effect, as found above, Beltone requires the dealers to carry, in new hearing aids, Beltone products only.

Beltone's practices violate the central policy of the antitrust laws by having the tendency and capacity to foreclose Beltone's competitors from selling to authorized dealers and thus violate Section 5 of the Federal Trade Commission Act. *See L.G. Balfour Co. v. Federal Trade* Commission, 442 F.2d 1, 20–21 (7th Cir. 1971).

Customer Restraints

As pointed out in the discussion on territorial restraints, any restriction by the seller on the persons to whom a buyer of his products can sell the products is suspect under the antitrust laws. *See United States v. Arnold, Schwinn & Co., supra.*

As already noted, the Beltone dealer is under coercive pressure not to do anything that would defeat Beltone's general policies of doing business. Certainly wholesaling and transshipping new Beltone hearing aids to non-Beltone dealers would tend to circumvent the exclusive territory arrangement. Beltone's policies of prohibiting transshipping and wholesaling and of exclusive territories, together with its actions to insure adherence to these policies, tracing aids through registration cards and refusing to provide [82]repair service to other than Beltone dealers, have the tendency and capacity to restrain such sales and, accordingly, violate the policies of the antitrust laws and Section 5 of the Federal Trade Commission Act.

Refusal To Deal

Generally, a seller may select his customers and, accordingly, may refuse to do business with certain potential customers. But such refusal to deal must not have any ulterior purpose or be a part of a plan or program that otherwise contravenes the policies of the antitrust laws. *See United States v. Parke, Davis & Co.,* 362 U.S. 29 (1960).

Respondents' practices of refusing to sell to, or provide repair service for, anyone other than an authorized dealer, in effect, insure that Beltone's basic business policy of having only one Beltone dealer in any designated area is not circumvented by another dealer's having the wherewithall to compete. These practices supplement Beltone's policies of territorial exclusivity, exclusive dealing and

restriction on resales by Beltone dealers to non-Beltone dealers. The fact that non-Beltone dealers cannot have nondiscriminatory direct access to repair parts and services has a tendency and capacity to foreclose them from competing with Beltone dealers in the service of Beltone products and Beltone users.

Such practices, having direct anticompetitive effects, contravene antitrust policy and violate Section 5 of the Federal Trade Commission Act.

Names of Users

Misappropriation by a seller of the business property of a buyer in order to engage in a combined attempt with a competitor of the buyer to capture his customers is an unfair trade practice. *See Peerless Dental Supply Co. v. Weber Dental Mfg. Co.*, 299 F. Supp. 331 (1969 E.D. Pa.).

Respondents argue that there is no evidence to show that they had access to or received all the names and addresses of their dealers' customers, that pursuant to the dealer agreement they have reserved to themselves the unrestricted use of names submitted on guarantee registrations,[56] and that their use of said names was for legitimate purposes. [83]

Respondents' requirement that the dealers submit the names and addresses of their customers is a factor to be considered in connection with respondents' ability to get the dealer to abide by Beltone's wishes as to how the dealer does business, including territorial exclusivity and customer selection. The further question here is whether, standing alone, the requirement is unlawful under Section 5 of the Federal Trade Commission Act, and whether respondents' uses of said lists (supplying names to succeeding dealers or renting names to companies outside the hearing aid industry) are "unfair" within the meaning of Section 5 of the Act.

Almost all of the dealers testified that the requirement that they send in the guarantee registration form existed to insure that the user obtained a factory warranty and that if the responsibility for submitting the required information was left up to the users, many of them would not send in the forms. Some dealers thought the requirement was to insure that the user had received a new instrument.

Names and addresses of users are a valuable business asset to the dealer. In addition, the user's relationship to the dealer is in the nature of a doctor-patient relationship and, especially where a doctor

[56] The provision granting to respondents the unrestricted use of the names submitted by its dealers was first incorporated into the dealer agreement in the 1971 form of agreement (CX 398).

or clinical referral to the dealer is involved, should be considered somewhat confidential.

Of course, there would appear to be nothing wrong if the dealer voluntarily submitted the names of his customers to Beltone for legitimate reasons, such as direct mail advertising when the dealer knows in advance the exact use, including the advertising copy to be sent. But under the terms of the dealer agreement, such a submission is *required* and Beltone dictates, unilaterally, the use it may make of the names. In these circumstances, such a requirement is an interference with the dealer's property rights and is an unfair practice under Section 5 of the Federal Trade Commission Act.

Moreover, respondents' practice of supplying the names to a competing dealer upon the termination of one of its dealers is clearly a misappropriation of the terminated dealer's property and is an "unfair" practice under Section 5 of the Federal Trade Commission Act. Similarly, respondents' mailing of the "Dear Friend" letter in which it announces the appointment of a Beltone dealer in competition with the dealer who submitted the names is also an "unfair" practice insofar as it misappropriates the dealer's property. **[84]**

Finally, rental of a user's name is unfair to both the dealer and the user, absent consent from each of them. *See* Commission Opinion, *Beneficial Corp.*, Docket No. 8922, 86 F.T.C. 119 at 158 (1975).

Respondents point out that their rental program ceased in 1973. However, voluntary discontinuance does not estop the Commission from issuing an appropriate cease and desist order, especially where such discontinuance is in the face of Commission investigation or formal proceeding by way of complaint. *Clinton Watch Co. v. Federal Trade Commission,* 291 F.2d 838, 841 (7th Cir. 1961), *cert. denied,* 368 U.S. 952 (1962); *Zale Corporation and Corrigan - Republic, Inc. v. Federal Trade Commission,* 473 F.2d 1317 (5th Cir. 1973).

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents Beltone, S. Posen, D. Barnow and C. Barnow.

2. This proceeding is in the public interest. The Commission so determined upon the assumption of jurisdiction through issuance of the complaint. *American Airlines, Inc. v. North American Airlines, Inc.,* 351 U.S. 79, 83 (1956). Nothing in the record or findings requires a different determination. *See Federal Trade Commission v. Klesner,* 280 U.S. 19 (1929).

3. The individual respondents formulated, directed and con-

trolled the acts and practices of the corporate respondent, including the acts and practices found herein.

4. Respondents engaged in the following acts and practices as alleged in the complaint:

A. They required their selected dealers to sell Beltone products within assigned geographic territories;

B. They required their selected dealers to deal exclusively in Beltone hearing aids;

C. They prohibited their dealers from dealing with certain potential customers;

D. They prevented others, not their dealers, from dealing in, or repairing Beltone products;

E. They appropriated and used for their own purposes the names and addresses of their dealers' customers. [85]

5. The aforesaid acts and practices of respondents, taken either individually or collectively, when considered with other practices, are oppressive, coercive and unfair, and actually, or have the tendency and capacity to, hinder, suppress or eliminate competition, are to the prejudice and injury of the public, and constitute unfair methods of competiton and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

REMEDY

The Commission is vested with broad discretion in determining the type of order necessary to insure discontinuance of the unlawful practices found. *Federal Trade Commission v. Colgate-Palmolive Co.,* 380 U.S. 374, 392 (1965). The Commission's discretion is limited only by the requirement that the remedy be reasonably related to the unlawful practices found. *Jacob Siegel Co. v. Federal Trade Commission,* 327 U.S. 608, 613 (1946); *Niresk Industries, Inc. v. Federal Trade Commission,* 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied,* 364 U.S. 883. The Commission is not limited to prohibiting the illegal practices in the exact form in which they were found to have been employed in the past and may close all roads to the prohibited goal. *Federal Trade Commission v. Ruberoid Co.,* 343 U.S. 470, 473 (1952); *Federal Trade Commission v. National Lead Co.,* 352 U.S. 419 (1957).

Counsel supporting the complaint have proposed an order to cease and desist that is significantly broader in scope than the proposed order which accompanied the complaint, and which contains numerous language modifications.

In their proposed findings respondents did not address themselves

to the terms of the proposed order that accompanied the complaint and in their answering brief they did not comment on complaint counsel's modification and additions thereto except to pray that the complaint be dismissed.

Upon consideration of complaint counsel's modification and additions to the proposed order in view of the findings as to the facts, the applicable law and legal conclusions and the ultimate conclusions in this Initial Decision, I am of the opinion that most of them should be incorporated into the order that is required by those findings and conclusions. [86]

Paragraphs 13 and 14 of the proposed order (pars. 14 and 15 of the order which follows) contain provisions substantially identical to those in the Commission order in *Adolph Coors Co.*, 83 F.T.C. 32 (1973). These paragraphs delineate the exact procedures and grounds on which terminations may be accomplished, including provisions for arbitration. The Tenth Circuit struck these provisions from the Commission's order in *Coors. Adolph Coors Co. v. Federal Trade Commission,* 497 F.2d 1178 (1974).[57] In pertinent part, the Court stated *(Id.* at 1188–89):

> The Commission held that Coors used the threat of speedy termination to force its distributors into anticompetitive behavior. There is substantial evidence in the record to support the Commission's holding.
>
> Coors has the right to terminate distributors according to the contract provisions which the distributors have agreed to. *Bushie v. Stenocord Corporation,* 460 F.2d 116 (9th Cir. 1972). However, it may not use the contract termination provisions to force its distributors into anticompetitive behavior.
>
> The Law Judge was correct in stating that the termination provisions of Coors and its distributors, based upon their contractual obligations, are a matter of private contract and are not subject to interference by third parties. The termination provisions are reasonable but may not be used by Coors to force any unlawful conduct. Therefore the Commission's attempt to rewrite Coors' contract termination provisions in paragraphs 12 and 13 of its Order must be set aside. The contract termination provisions do not violate Section 5 of the Federal Trade Commission Act.

In the context of the present case, however, the termination provisions in the dealer agreements that are presently in effect are not reasonable because in the context of the relationship between Beltone and its dealers they are inherently coercive. This coercive threat of termination [87]along with the substantial business rights of the dealer that it would erase is found to have a direct bearing on the dealer's acquiesence to conduct his business in line with Beltone's philosophies, resulting in the anticompetitive conduct and

[57] The Commission's petition for a writ of certiorari to the Supreme Court was denied. 419 U.S. 1105 (1975).

behavior violative of Section 5 of the Federal Trade Commission Act. *See Federal Trade Commission v. Texaco,* 393 U.S. 223 (1968).

The cases clearly hold that the Commission may issue orders that in effect cancel or modify contractural provisions which effectuate the unfair trade practices. *Atlantic Refining Co. v. Federal Trade Commission,* 381 U.S. 357, 376–377 (1965); *L. G. Balfour Co. v. Federal Trade Commission,* 442 F.2d 1, 23 (7th Cir. 1971). Terminating outstanding contracts has long been considered a proper remedy in antitrust cases. *See United States v. International Boxing Club of New York, Inc.,* 171 F. Supp. 841, 842 (S.D.N.Y. 1957), *affirmed,* 358 U.S. 242 (1959).[58]

There is no doubt that the Commission may prohibit respondents from terminating their dealers, except as permitted in an order to cease and desist.

I agree with complaint counsel that a prohibition against respondents' use of "potentials" or "quotas" in any form should be added to the order. As found herein, respondents have used such figures, which they increased substantially over the years, as a standard to measure whether the dealer is adequately penetrating the market, and have used failure to so do, *i.e.,* to reach 100 percent of potential, as a ground for termination. Apparently, complaint counsel inadvertently omitted such a paragraph from their proposed order (Compare Pro. Find. p. 254 with proposed order paragraph 10). The following paragraph will be inserted into the order:

10. Stating to dealers, in any manner, a specific number or percent that can be equated to the number of new hearing aids the dealer must purchase from Beltone or resell for any given period of time. [88]

Of course nothing in this paragraph is intended to prohibit respondents from reporting or stating the actual total of sales made by a dealer in the past.

Complaint counsel also propose that paragraph 2 be modified to provide that Beltone products or repair services be made available to dealers or persons engaged in the repair of hearing aids on nondiscriminatory terms, and that the "100 mile" proviso be dropped because Beltone sells nationwide. These proposed changes are adopted. In addition complaint counsel would eliminate all provisions relating to the qualifications required of dealers to whom it sells or, alternatively, if Beltone retains any such subjective qualification requirements, they be limited in applicability to dealers

[58] It should be noted that there are many other provisions of the dealers' agreement that must be stricken or modified under the terms of this order.

in states that do not have licensing. In my opinion the latter is more appropriate.

I agree with complaint counsel that the proviso relating to alternate available sources of supply for Beltone products from existing dealers should be deleted. The subparagraphs of paragraph 2 will be relettered and renumbered to make future references more exact.

Complaint counsel also propose that paragraph 7, which relates to the submission of customer lists, be modified to specifically provide for full disclosure, free and informed consent, and a cooling-off period before any consent can be sought, before respondents can use the customer lists for any purpose. This change appears appropriate.

Although respondents have not engaged in "price fixing" such a practice was not necessary to avoid "price cutting" or price competition in view of the territorial exclusivity required by respondents and practiced by the dealers. The record shows that there was almost no actual competition among Beltone dealers and Beltone's only concern about pricing was to prevent "price gorging." However, because Beltone will now be required to sell Beltone products and services to any qualified dealer requesting same, a prohibition against Beltone's interference with dealer retail pricing would now appear to be very appropriate as being a "road block to a prohibited goal." Paragraph 5 of the order contains such a prohibition.

The other paragraphs of the order (pars. 1, 3, 4, 6, 8, 9, 11, 12, 13) appear to directly correspond to the practices in which respondents were found to be engaged and which resulted in the illegal trade restraints, and, in my opinion, they are appropriate. Complaint counsel **[89]**have also made numerous word changes in the language of their proposed order which seem to clarify its terms without making substantive change. Complaint counsel's revised language will be adopted.

Finally, the order should run against the individual respondents in their individual capacities. The record clearly demonstrates their direct involvement in all aspects of the activities challenged in this matter, notwithstanding a prior proceeding and order which related generally to some identical practices. Although it would appear remote that these individuals would engage in the hearing aid business outside of the structure of the corporate respondent, it does impose upon them the duty, insofar as they are involved in Beltone's operations, to effect and not hinder compliance with any order that may ultimately become "final" in this matter, within the meaning of Section 5(1) of the Federal Trade Commission Act.

ORDER

I.

It is ordered, That respondents Beltone Electronics Corporation, a corporation, its subsidiaries, successors, assigns, its officers, and Sam Posen and David H. Barnow, individually and as officers of said corporation, its directors, and Chester K. Barnow, individually and as a director of said corporation, and respondents' agents, representatives and employees, directly or indirectly, or through any corporate or other device, in connection with the manufacturing, distribution, advertising, offering for sale, sale or repair of their own brand name or trademark hearing aids, or related products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from: **[90]**

1. Entering into, maintaining, preserving, or enforcing, by refusal to sell or repair, setting of sales quota or equivalent thereof, termination or threat thereof, communicated suggestion, expectation or request, or in any other manner, any arrangement or method of doing business with a dealer of hearing aids and/or accessories which has the purpose or effect of precluding or preventing a dealer from selling the product of one or more other hearing aid manufacturers;

2. (a) Refusing to make available on nondiscriminatory terms, prices and conditions of sale promptly upon request:

(1) a hearing aid, accessory or any written materials necessary to fit and sell such hearing aid or accessory, to any dealer engaged in the sale of hearing aids;

(2) a repair or replacement part or any written materials necessary to repair or replace such hearing aid, to any person engaged in the repair of hearing aids when requested for such purpose, if respondents make repair or replacement parts available to any dealer for such purpose; and

(3) factory repair service when requested by any dealer who sold such aid; **[91]**

(b) *Provided, however,* only with respect to dealers located in states which do not license hearing aid dealers and if no other provision of this order is violated thereby:

(1) respondents may require as a condition to the availability directly from them of any of their products, that the dealer referred to in 2(a) above has received instruction or met standards necessary for the fitting and servicing of respondents' hearing aids which are

required at that time of all then existing dealers of respondents' products so long as such instruction, if made available to any dealer, is made available by respondents on equal terms to all dealers wanting to deal in respondents' product,

(2) respondents may refuse to make available directly from them any of their products to any dealer or person on grounds related to that dealer's or person's professional competence or ethical conduct, so long as such refusals are uniformly made where such grounds exist. **[92]**

3. Entering into, maintaining, preserving, or enforcing, by refusal to sell or repair, setting of sales quota or equivalent thereof, termination or threat thereof, communicated suggestion, expectation or request, report of sale, warranty limitation, use of names or addresses of a dealer's customers, use of areas of primary marketing responsibility or the equivalent thereof, or in any other manner, any arrangement or method of doing business which has the purpose or effect of restricting or limiting;

(a) the territory or area in which a dealer of respondents' hearing aids advertises, offers for sale, sells or repairs such products, or

(b) the persons with whom a dealer of respondents' hearing aids deals;

4. Failing to return any hearing aid submitted to respondents for repair directly to the person who submitted such product for repair, unless otherwise instructed in writing by such person;

5. Fixing, establishing, stabilizing, maintaining or suggesting the prices at which a dealer of respondents' hearing aids may or shall advertise, offer for sale, or sell to the public, or a person repairing respondents' hearing aids may repair, such products; **[93]**

6. Requiring that a dealer participating in respondents' cooperative advertising program must not state or imply, in such cooperative advertisements, that the dealer also deals in other brands of hearing aids; *provided, however,* that respondents may continue to prohibit in such cooperative advertisement that stating of other brand names of hearing aids;

7. Requiring or coercing a dealer to submit to respondents the names or addresses of any customers of the dealer or, with respect to such customer names or addresses obtained from a dealer, maintaining, using, publishing or disseminating them for any purpose, without securing the free and informed written consent of the dealer for each such purpose based upon full disclosure to the dealer of the specific uses and disseminations which would be made of the customer names. No such consent shall be sought for at least two

hundred and forty (240) days from the date of respondents' initial inventory shipment of hearing aids to a new dealer or, in the case of an existing dealer, at least sixty (60) days after service on the dealer of this Order and letter set forth on page 99 [94]hereof. The names and addresses of a dealer's customers shall not be used for the benefit of another dealer without the free and informed consent, immediately prior to such use, of the dealer whose customer names are to be used, or unless the dealer has completely abandoned the dealership. The names and addresses of users of Beltone hearing aids shall not, without the user's free and informed consent, be sold, rented, leased or otherwise transferred to firms or persons not engaged in the hearing aid business;

8. Preventing any dealer by contract or agreement from using respondents' product (brand) name in connection with the advertising, offering for sale, sale or repair of any respondents' products, except that respondents may protect their rights in such name recognized at law;

9. Failing to include and deliver with any hearing aids sold by respondents any express product warranty for such product provided to the user.

10. Stating to dealers, in any manner, a specific number or percent that can be equated to the number of new hearing aids the dealer must purchase from Beltone or resell for any given period of time; [95]

11. Requiring that dealers transfer their telephone number to the corporate respondent or to such person as it may specify; or that dealers agree to the cancellation of their telephone number;

12. Requiring that respondents have the option of purchasing from a dealer any hearing aids or related products purchased from respondents which the dealer has in inventory;

13. Hindering, suppressing or eliminating competition or attempting to hinder, suppress or eliminate competition between or among dealers handling respondents' hearing aids or related products;

14. Terminating any dealer agreement unless and until the respondents have pursued the following procedure:

A. Termination With Cause

(a) The corporate respondent has given the dealer sixty days' notice of its intention to terminate the agreement with the dealer;

(b) Said notice, referred to in (a) above, will include in writing an assurance that the contract is being terminated in good faith and for material violation of one or more contract provisions which are relevant to the effective [96]operation of the dealership. Said notice

shall further provide a list of the specific reasons for which the dealership is being terminated;

(c) Said notice will include the assurance that the dealer may sell his interest to a third party during the sixty days, subject to the corporate respondent's approval of the buyer as a satisfactory dealer of its products and the further assurance that approval will not be unreasonably withheld;

(d) Said notice will also include the statement that the dealer has the right to have the contract termination reviewed in an arbitration proceeding as hereinafter provided, to ascertain whether the termination has been made otherwise than in good faith and otherwise than for material violation of one or more contract provisions which are relevant to the effective operation of the dealership.

B. Termination Without Cause

(a) The corporate respondent has given the dealer one hundred and eighty days' notice of its intention to cancel its agreement with the dealer; **[97]**

(b) Said notice, referred to in (a) above, will include in writing an assurance that the contract is being terminated in good faith. Said notice shall further provide a list of the specific reasons for which the dealership agreement is being terminated;

(c) Said notice will include the assurance that the dealer may sell his interest to a third party during the one hundred and eighty days subject to the corporate respondent's approval of the buyer as a satisfactory dealer of its products, and the further assurance that approval will not be unreasonably withheld;

(d) Said notice will also include the statement that the dealer has the right to have the contract termination reviewed in an arbitration proceeding as hereinafter provided to ascertain whether the termination has been made otherwise than in good faith.

15. *It is further ordered,* That the corporate respondent, within three (3) months from the date this Order becomes final, shall provide for arbitration, in the city in which a dealer resides, by an independent and neutral arbitrator, to determine in the case of any **[98]**announced termination, and upon the request of a dealer, whether or not said termination is made in good faith (in the case of termination without cause) or whether or not said termination is made in good faith and for material violation of one or more contract provisions which are revelant to the effective operation of the dealership (in the case of termination with cause). The arbitrator shall find that a termination of any dealer agreement is not made in

good faith if the arbitrator finds that the termination would constitute a violation of the antitrust laws or this Order.

All costs of arbitration, except for the dealer's attorney's fees, shall be borne by the corporate respondent, *provided, however,* if in the course of the arbitration proceeding it is determined by the arbitrator that the dealer's claims are not brought in good faith, the dealer shall bear the costs of arbitration other than respondent's attorney's fees. The dealer's right to arbitration shall be conspicuously noted in all present and future dealership agreements.

II.

It is further ordered, That respondents shall:

(a) Forthwith distribute a copy of this Order to each of the corporate respondent's operating divisions, to its present corporate officers and to its present sales and repair personnel, and shall secure from each **[99]**such officer, employee or other person, a signed statement acknowledging receipt of said Order;

(b) Within thirty (30) days after service upon them of this Order, distribute a copy of the following letter to each of their existing hearing aid dealers and to every person known to be engaged in the repair of respondents' products;

(LETTER TO HEARING AID DEALERS)

(Official Stationery of Beltone
Electronics Corporation)

Date

Dear :

The Federal Trade Commission has entered an order against the Beltone Electronics Corporation, which obligates the company not to impose various restrictions upon dealers or to engage in certain other practices. A copy of the pertinent provisions of the Order is enclosed for your careful examination. If in the future you believe that any of its terms have been violated, the details may be reported in writing to:

Federal Trade Commission
Bureau of Competition
Washington, D.C. 20580

We welcome the opportunity to do business with you on terms which are in accordance with the letter and the spirit of the Federal

Trade Commission Order.

Very truly yours,
(Name)
President
Beltone Electronics Corporation.

Enclosure

[100](c) Within sixty (60) days after service upon them of this Order, place a full-page advertisement in a trade journal or publication with circulation among hearing aid dealers, which advertisement shall clearly and conspicuously disclose the provisions of Part I of this Order;

(d) Within one hundred and twenty (120) days after service upon them of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this Order, including a list of all dealers and other persons on whom they have served a copy of Appendix A, and a copy of the publication which includes respondents' advertisement required by this Order;

(e) For a period of ten (10) years from the date hereof establish and maintain a file of all records referring or relating to respondents' refusal to sell to any hearing aid dealer, or person engaged in the business of repairing hearing aids, which file must contain a record of a communication to such dealers or persons explaining respondents' refusal to sell, and which file will be made available for Commission inspection on reasonable notice; and annually, for a period of five (5) years from the date hereof, submit [101]a report to the Commission listing the names of all dealers or persons with whom respondents have refused to deal over the preceding year, a description of the reason for the refusal, and the date of the refusal;

(f) Notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this Order.

III.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a

new business or employement. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged, as well as a description of their duties and responsibilities.

APPENDIX A

Appendix A

Conduct of Respondents' Dealer Witnesses *
Re Other Brand and Out-of-Territory Sales

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales ** Whether Actively Solicits Outside of Territory	Out-of-Territory Sales ** Circumstances of Out-of-Territory Sales
C. Allen Eau Claire, WI	No (17040)	Sold 1 Starkey, 6 Oticon, 1 Qualitone of 547 aids in 1974 (17087) None from 1960-1973 (17040; 17086-88)	On professional referral (17041)	-	No (17043; 17089)	None (17092-93; 17089-90)
L. Azar Huntsville, AL	Yes (15881)	N/A	N/A	N/A	No (15883)	5 or 6 in 13 years (15926)
L. Bain Riverside, CA	No (9016)	"Primarily" Beltone (9016)	Professional referral, customer preference (9017)	No (9023)	Yes (9027)	"Occasionally" sell in San Diego Co., Orange Co., and "sell a lot" in San Bernardino Co. (9028)
W. Beattie Saginaw, MI	No (17379-80)	3 of 375 in 1970 3 of 375 in 1971 4 of 375 in 1972 Some years none (17413-14)	Result of M.D. or clinic referrals (17380)	No (17414)	No (17383)	4 or 5 per year "at most" (17416) out of 375 (17413)

* Respondents have held out these 70 witnesses to be a representative cross-section of existing Beltone dealers (Tr. 14910, 18376).

** Sales which physically took place outside of a dealer's "area of primary marketing responsibility." Sales where an out-of-territory customer, often a visitor, purchases an aid while in the dealer's in-territory office or service center are not included.

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out-of-Territory Sales
G. Brasel Houston TX	No (15192)	30-35 of 4000-5000 aids (15233) Started other brands in 1972 (15228)	On professional referral (15191)	No (15222)	No (15196, 15234)	"Occasions" on customer or professional referral (15194-96)
R. Bourgeois Albany, NY	Yes (12901)	N/A	N/A	N/A	No (12905)	Never sold outside (12905)
D. Bruner, Sr. Olympia, WA	Yes (14692)	N/A	N/A	N/A	No (14689, 14693)	Never extra-territorially (14686, 14693)
M. Burak San Diego, CA	No (13905)	40 of 1400 (13974) "Close to 100% Beltone" (13905)	Clinic referrals and customer preference (13906, 13920)	No (13975)	Yes (13925, 13927)	41 of 1400 (13975)
Bakersfield, CA	No (13905)	-	-	-	-	-
Los Angeles, CA	-	-	-	-	-	-
H. Cato Clarksburg, WV	Yes (11913)	N/A	N/A	N/A	No (11938-39)	Only on personal (family) referrals (11938-39)
Greensboro, NC	No (11927)	5% (11980)	Only on clinical referrals (11927)	No (11980-81)	-	-
A. Coppola Orange, NJ	Yes (12435, 12441)	N/A	N/A	N/A	Yes (12467)	On direct personal referral (12442, 12467)
Hudson County, NY	Yes (12435)	N/A	N/A	N/A	-	A "few" (12436)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out-of-Territory Sales
R. Culver Van Nuys, CA	No (14036)	30-50 of 2500 in last 4 years. No other brands in first 5 years (14085)	On professional referral; recently stopped (14037-38)	No (14137), except for poster for one year (14138)	Unclear; turns extra-territorial leads over to competitors (14041-42, 14121, 14124, 14126)	On personal referral (14041)
R. Durbin Dallas, TX	No (17136)	Two sales of other brands from 1969 to present (17136)	Customer request (17136)	-	No (17135)	No extra-territorial sales (17139)
J. Elias Memphis, TN	Yes (15346)	N/A	N/A	N/A	No (15340)	Might have "Stepped over the line" (15340)
Little Rock, AR	Yes (15340)	N/A	N/A	N/A	No (15349)	-
D. Galloway Rochester, NY	Yes (12077)	N/A	N/A	N/A	Yes (12090-92)	Cannot give estimate of extra-territorial sales (12142-44)
H. Gilliam Texarkana, AR	Yes (15495)	N/A	N/A	N/A	No (15496, 15498)	None (15496)

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Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Activity: Whether Actively Solicits Outside of Territory	Out-of-Territory Activity: Circumstances of Out-of-Territory Sales
E. Glesple Pontiac, MI	No (17883)	5 or 6 aids in five years (17936-37)	In Pontiac sold "a few" Starkey aids which were in stock when three competitive offices were purchased (17892, 17895)	-	No (17935)	Referrals in neighboring areas (17935-36)
Port Huron, MI	Yes (17883)	N/A	N/A	N/A	No (17884)	None (17884)
H. Gorlin Miami, FL	No (11424)	5-10% (11424)	Prescription referral and where necessary for configuration of user's ear (11425, 11474)	No (11474)	No, only as result of personal referral (11428) and leads from in-territory newspaper ads which also circulate outside (11465-67)	-
B. Harlow Newport News, VA	No (13002)	1 Rexton, 2 Otlcons, 3 Starkey from 1968 to present (13003, 13058-59)	On clinic referral (12985, 13003) and needs of patient (13003)	-	No (13009)	No more than 9 times from 1968 to present (13059-60, 13002)
H. Hood Atlanta, GA	Yes (12515)	N/A	N/A	N/A	No (12512)	2 sales by salesmen contra to instructions (12519)
Quincy, IL	Yes (12494)	N/A	N/A	N/A	No (12495-96)	None (12495-96)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out-of-Territory Sales
L. Hudson Bolling Green, Ky.	Yes (16142-43)	N/A	N/A	N/A	No (16150-154)	Less than 1% in 1971 and not more than 2% in 1972 (16184-86, 16201) Sends referrals located outside of territory to neighboring dealer (16150)
J. Hulser W. Hartford, CT	No (12034)	3 aids sold last year (12034); none from 1965 to 1974 (12025, 12027)	Bone conduction aids at customer request (12034)	-	No, only on referral (12035, 12037)	-
J. Ivy Glassboro, NJ	No (12727)	"Primarily" Beltone (12727)	Only on clinic referrals (12729-30)	-	Yes (12734)	30 of 329 in 1972 (12766)
P. Jeter Jackson, MS	Yes (15424)	N/A	N/A	N/A	No (15427)	By inadvertence or customer request (15427)
R. Johnson Corbin, KY	Yes (12333)	N/A	N/A	N/A	No (12335-36)	None (12335-36)
D. Jones St. Louis, MO	Yes (15598)	N/A	N/A	N/A	No (15611)	One half of 1% (15643)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out-of-Territory Sales
S. Kaufman Chicago, IL	No (9610)	"Moderate" volume of other brands (9611). 80 of 255 in 1974 (9666).	Professional referral, customer preference, Beltone unsuitable (9611-12, 9670)	Yes (9613)	Yes (9607). But not before 1972 See CX 475b	-
J. Keel Columbus, GA	Yes, since 1963 (12796, 12794, 12797)	N/A	Experimented with selling other brands for only 2-3 months prior to 1963 (12792-93)	Yes, until 2 years ago (12832-33) (inconsistent)	No (12798).	Never sold outside (12798)
R. Kindopp Eugene, OR	No (14780)	"Very few" (14781, 14795) Exclusively Beltone until 90 days before testimony (14780-81)	Sold Starkey because of ear mold (14780-81)	-	No. Consultants are instructed to stay within territory (14794)	Limited sales to users on rural mail route which overlaps another dealer's territory (14793), and to personal friends (14790)
R. LaMontagne Springfield, IL	No (18043)	3 Oticon, 2 Starkey throughout entire dealership (18044-46, 18091). Sold 300 aids in 1974 (18093)	Customer preference or the nature of hearing loss when a Beltone could not correct problem (18044-46)	-	Unclear (18047) Advertising leads, personal referral	6 out of 300 in 1974 (18092-93) Normally less than 3% (18094)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent Number or Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Whether Actively Solicits Outside of Territory	Circumstances of Out-of-Territory Sales
C. Langham Denver, CO	Yes (14556)	N/A	N/A	N/A	No (14560)	Never sold outside (14560)
G. Laster Deerfield, IL	No (18289)	25 Starkeys in past year out of 275-285 aids; less than 5 Oticons in past 5 years; 2 Widex throughout dealership; 2 Maico in past 5 years (18335)	Clinic referral and customer preference (18291-93)	-	No (18294)	"Very seldom" (18295)
M. Levy Knoxville, TN	No (13206)	"Rare occasions" (13206) Has sold 6 Starkeys in last 2 years (13208) None before (13208)	When a customer's needs could not be met by Beltone aid (13206). Most sold within past 2 years.	-	No (13209-10, 13289)	"On rare occasions it probably happened." (13209), e.g., family referral (13210).
B. Lipin New Haven, CT	No (11099)	10 of 365 - 1970 15 of 480 - 1971 30 of 495 - 1972 40 of 480 - 1973 30 of 480 - 1974 (11172-75)	On professional referral (11099) and customer request (11102)	No (11172)	No (11181-11182).	Sells out of territory only as result of professional or personal referral (11112) Sends fair leads to appropriate dealer (11182)
G. Lucas Springfield, MA	Yes (11698)	N/A	N/A	N/A	Yes. (11705-07)	Does not advertise (11730, 11756) nor maintain office outside (11790)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales	
					Whether Actively Solicits Outside of Territory	Circumstances of Out-of-Territory Sales
L. Madsen Provo UT	No (14881)	5-10% non-Beltone (14881)	Started 2 1/2 years ago. Needs lower priced aids to compete for welfare or state rehab.; referrals; cosmetic and fitting reasons (14881-82, 14885, 14887)	No ad in phone book but has store display (14946-47)	No. (14891)	Only on personal referral (14891) Twice throughout dealership (14949)
G. Magurea Sacramento, CA	No (13504)	7 of 600 in 1972 7 of 800 in 1974 (13540)	On clinic referral (13506)	-	No. (13510)	None (13510)
R. Martin Milwaukee, WI	Yes (17225)	N/A	N/A	N/A	No (17233)	None (17233)
Datona Beach-Eau Gallie, FL	Yes (17232-33)	N/A	N/A	N/A	No (17234)	None (17234)
H. Mattingly Huntington, WV	Yes (11016)	N/A	N/A	N/A	Not clear in transcript (11019-20)	-
B. McCurdy Roanoke, VA	Yes (11264, 11266)	N/A	N/A	N/A	No (11370)	Only by direct referral from customer, usually a close friend or relative (11267)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out-of-Territory Sales
D. McMillan Evansville, IN	No (122227)	Only 2 non-Beltone aids sold from Beltone office (12226-27); 570 aids in 1972 and 531 aids in 1974	Specifically requested by a customer (12228); owned Zenith dealership for a short while which was run separately in another office (12224-27, 12200, 12268)	No (12268)	No (12230, 12232-33)	"Isolated cases" (12232)
W. Metcalfe Oklahoma City, OK	No (16332)	One sale of another brand (CX 600)(16332)	Professional referral (16332)	-	No (16338-39)	One aid on referral (16338)
L. Miller Casper, WY	Yes (14967)	N/A	N/A	N/A	No (14971)	Never sold outside (14971)
W. Mitadarffer LaSalle, IL	Yes (17489)	N/A	N/A	N/A	No (17490)	One sale (17490)
Joliet, IL	No (17478)	2 aids (17478)	Professional referrals (17478)	-	No (17480-82)	One sale (17481-82)
W. Morris Reno, NV	Yes (13565)	N/A	N/A	N/A	No (13570)	Never sells outside (13570)
M. Moses Cedar Rapids, IA	No (17288)	6 of 1100 in last 5 years (17328, 17336-39)	Audiologist referrals (17289)	-	No (17349)	Under 5% (17342) on user request (17294) and with agreement of neighboring dealers (17361)

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Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out of Territory Sales: Whether Actively Solicits Outside of Territory	Out of Territory Sales: Circumstances of Out-of-Territory Sales
P. Osnowitz Bloomington, IN	No (18112)	Less than 5 of 300 (18143)	Referrals (18112)	No (18144)	No (18117)	Less than 5 of 300 (18151, 18143) on personal referral (18117)
E. Owenby Tucson, AZ	No (14234)	"Primarily" Beltone, other brands from time to time (14234)	Purchased other brands for comparison or customer preference (14234-35)	No (14305)	No (14236-37)	Less than 10 of 328 per year (14292); only on referral (14237)
C. Partin Florence, AL	Yes (16466)	N/A	N/A	N/A	No (16464)	None (16464)
J. Paul Fresno, CA	No (13659)	"Seldom" (13661-62)	Referral or customer request (13659)	No (13718)	No (13664)	Never sells outside (13665)
J. Pannette Johnsonburg, PA	No (13149)	"Negligible" for each year of dealership (13176)	At customer request (13149)		No. Personal referrals to family members and the like (13151-52)	Sold only 5 aids outside of territory in all years as consultant or dealer (13151)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out-of-Territory Sales
R. Perisho Escondido, CA	No (14344)	1 Zenith and 4-5 Starkey out of 825 (14363-64, 14344-45)	Referral and customer preference (14345). Started in 1974 (14362). Recently stopped selling others (14346)	-	No (14347)	1 of 825 (14363-65)
Fond du Lac, WI	No (14331)	One sale of another brand (14331)	Customer request (14332)	-	No (14334)	Sale to relative (14334, 14336)
J. Pierson Central Pt., MI	No (15024)	Sold about 26 Audivox aids left in stock when he became a Beltone dealer after quitting Audivox (15024) Sold about 20 out of 1100 aids throughout course of Beltone dealership (15024, 15026, 15072)	Had consultant who was familiar with Starkey aids. No longer selling them (15026, 15031)	No (15072)	No (15034)	Never sold outside (15034)
J. Proctor Pasadena, CA	No (15111)	Less than 25 of 775 in last 5 years (15151-52)	On professional referral (15111)	No (15161)	No (15125)	"Once in a while". Less than 5% (15155-56) where referral (15124-25)

Dealer Name Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out-of-Territory Sales
S. Rabinowitz Norfolk, VA	No (13467)	Roughly 12 out of 700-800 (13487)	Sold Fidelity and Oticon on clinic referral (13467)	-	No (13470)	Never sold outside territory (13470)
Chicago, IL	Yes (13452)	N/A	N/A	N/A	No (13452)	None (13452)
J. Rawlings Cape Girardeau, MO	Yes (16526)	N/A	N/A	N/A	No (16529) Forwards all out of territory leads generated by advertising to appropriate Beltone dealer (16550-O - 50-R)	None (16529)
W. Rice Wichita, KS	Yes (16267)	N/A	N/A	N/A	No (16270)	"Less than one hundreth of 1%" (16,279C)

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Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Grant Territory Sales: Whether Actively Solicits Outside of Territory	Grant Territory Sales: Circumstances of Out of Territory Sales
G. St. James Providence, RI	No (12653)	Has sold 1 other brand aid in the past five years (12690-93)	-	No (12692)	No. At state fairs with agreement of neighboring dealers and personal referrals (12695)	"Infrequent" (12695)
R. Scheutzow Canton, OH	No (13379)	"Occasionally". (13379) 10-15 Oticons in past two years and before then 1 Siemens in 1966 (13410) Sold 700 aids in 1974 (13407)	Sold one Oticon on M.D. referral. Also a few on clinic referral. (13380)	No (13411)	Yes (13388)	5% (13414, 13416)
S. Sloane Bridgeport, CT	No (10933)	25 out of 900 in 1972 (10959)	As result of clinic referrals (10966)	No (10960)	Yes (10940)	-
D. Sturtz Port Huron, MI	Yes (17960, 17964)	N/A	N/A	N/A	No (17967)	On personal referral (17967)
C. Tabokin Clarksburg, WV	Yes (13090)	N/A	N/A	N/A	No (13096-99)	3 or 4 sales (13096)
M. Tabor Wyandotte, MI	Yes (18209)	N/A	N/A	N/A	Unclear	On referral (18213); 10% (18257) and in answer to newspaper ads that overlap territory (18260)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out of Territory Sales
L. Thibault McAllen, TX	Yes (15962)	N/A	N/A	N/A	No (15962)	Once in Texas (15962)
Wilmington, DE	Yes (15953)	N/A	N/A	N/A	-	Twice in Delaware (15954)
A. Truitt	Yes (15680)	N/A	N/A	N/A	No. (15677)	Only on personal referral (15676); "considerably less than 1%" of sales since 1970 (15702-03)
J. Tsekurus St. Louis, MO	No (15263)	10 throughout St. Louis dealership (15316)	Sold Fidelity for a short time until Beltone produced comparable aid. Now sells only Beltone. (15263-66, 15269-71)	-	No (15275)	-
Milwaukee, WI	Yes (15249)	N/A	N/A	N/A	No (15252)	-
B. Ugoretz Baltimore, MD	No (11585)	Less than 5% (11585)	Sold Fidelity and Dahlberg because preferred by customer (11585)	No (11620)	No, but will sell outside on personal referrals (11589)	7-10% (11591)
R. Wheeler Burlington, VT	Yes (13317)	N/A	N/A	N/A	No (13318)	Never gone outside (13318)

Dealer Name and Location	Whether 100% Exclusive Dealer	Approximate Percent or Number of Other Brand Sales	Circumstances of Other Brand Sales	Advertising or Open Display of Other Brands	Out-of-Territory Sales: Whether Actively Solicits Outside of Territory	Out-of-Territory Sales: Circumstances of Out of Territory Sales
B. Wofford, Jr. Chicago, IL	No (10091)	"Primarily" Beltone. Occasionally sells Siemens and Radioear (10091)	Referrals from Government agencies (10092-93)	No (10117)	Yes (10091, 10233-34)	Does sell outside substantially (10091)
B. Wofford, Sr. Hot Springs, AR	Yes (15764)	N/A	N/A	N/A	No (15774)	Will follow rural mail route (15773)
M. Yarlott Napa, CA	No (13810)	4 times a year. (13812)	Clinic referrals (13810)	No (13856-57)	No (13807)	-

Summary of Other Brand Sales

Percentage	Number of Dealerships
100%	41
99	21
98	3
97	5
95	5
69	1
"seldom"	1
"primarily"	4
unknown	2
	83

APPENDIX B

BELTONE
ELECTRONICS CORPORATION
CHICAGO, ILLINOIS

FRANCHISE

THIS AGREEMENT, by and between Beltone Electronics Corporation, an Illinois corporation with principal offices at 4201 West Victoria Street, Chicago, Illinois, hereinafter called "BELTONE", and Hearing Aid Services, Inc. d/b/a Beltone Hearing Aid Service, Winchester, Virginia hereinafter called "DEALER";

WITNESS:

WHEREAS, BELTONE engages in the manufacture and sale, at wholesale, of hearing aids, batteries, hearing test equipment, and related articles, hereinafter called "BELTONE Products"; and

WHEREAS DEALER desires to sell, at retail, BELTONE Products;

NOW, THEREFORE, in consideration of the mutual covenants and understandings set forth hereinafter, and the faithful performance thereof by the respective parties, BELTONE and DEALER hereby agree, as follows:

Article 1. BELTONE hereby appoints DEALER a retail DEALER for the sale of BELTONE Products within the following area of primary marketing resposibility: In the State of Virginia, the Counties of Clarke, Fauquier, Frederick, Loudoun, Prince William, Rappahannock, Shenandoah, Warren and Winchester City. In the State of West Virginia, the Counties of Berkeley, Jefferson and Morgan. In the State of Maryland, the Counties of Frederick and Washington. DEALER hereby accepts such appointment and agrees to use his best efforts to promote and increase the sale of BELTONE Products throughout such area and to achieve the market potential determined, from time to time, by BELTONE.

Article 2. BELTONE grants to DEALER the right during the term hereof to use the trademark, "BELTONE", but only in a manner approved, in writing, by BELTONE and such use shall cease within thirty (30) days of DEALER's receipt of written notice from BELTONE. DEALER shall never incorporate under any trade name or style using said trademark. DEALER shall not use any name or business style suggesting or indicating that he operates a BELTONE branch office or subsidiary, and he shall take such affirmative steps, as BELTONE may direct, in writing, to advise the public of his independent status.

Article 3. BELTONE shall sell to DEALER, and DEALER shall pay for ordered BELTONE Products at prices and on such other terms established by BELTONE. All orders shall be subject to acceptance by BELTONE at Chicago and shall be shipped f.o.b. BELTONE's factory. BELTONE shall not be responsible or liable for failure to make delivery because of an act of God, unavailability of supplies or materials, government regulations, laws, accidents, or any condition not within BELTONE's exclusive control.

Article 4. On all leads (names and addresses of prospective purchasers) furnished by BELTONE, DEALER shall report promptly to BELTONE, on forms supplied by BELTONE, the results of such leads and other information relating thereto, as BELTONE may, from time to time, require in its DEALER procedure manual or otherwise. All leads furnished to DEALER by BELTONE shall

be and remain BELTONE's sole property and shall not be used by DEALER, at any time, for any purpose other than to sell BELTONE Products.

Article 5. DEALER shall promptly register with BELTONE, on forms supplied by BELTONE, each BELTONE Product sold, giving the purchaser's full name and address, purchase date, serial number of the purchased instrument, and other information required from time to time. BELTONE shall have no obligation under its guarantee program, unless and until such forms are received by it in conformance with requirements that BELTONE may, from time to time, prescribe in its DEALER procedure manual or otherwise. Nothing contained in this Article shall deprive BELTONE of any rights which it may have if DEALER fails to comply with his obligations hereunder, including the right to terminate this Agreement forthwith.

Article 6. BELTONE shall make available to DEALER, from time to time, assistance, training, sales aids, advertising and promotional support, product information, and equipment (on loan or rental). DEALER shall make full use of all such assistance and material and shall participate in all BELTONE programs, such as its National Training Centers, Regional Meetings, and National Conventions. DEALER shall comply with all the terms of BELTONE cooperative advertising plans and other programs.

Article 7. DEALER shall give full cooperation and assistance to all users of BELTONE Products whether or not purchased from him, and shall comply with all BELTONE service plans, including the BELTONE Certified Hearing Service Plan. Services performed by DEALER shall conform with the standards of quality established by BELTONE. DEALER shall not make excessive service charges and shall not make any service charge on BELTONE Products within guarantee, whether or not purchased from him.

Article 8. DEALER shall not, during the term hereof or thereafter, commit any act, make any representations, or advertise in any manner, which may adversely affect any BELTONE right or be detrimental to BELTONE's name and reputation, BELTONE Products, or any other BELTONE DEALER.

Article 9. DEALER is an independent contractor. Neither DEALER nor any of his employees, agents, or representatives shall be deemed, expressly or by implication, to be BELTONE's employee, agent, or representative. None of them shall have the right to make any representations or incur any obligations on BELTONE's behalf. Nothing herein shall interfere with or prevent BELTONE from operating under any present or future program for the sale of BELTONE Products, including its Audiometric Instruments Division sales programs and government sales programs.

Article 10. This Agreement has been entered into by BELTONE in reliance upon DEALER's personal integrity, ability, and full time participation in the retail hearing aid business. The obligations and benefits hereof shall not be assigned, transferred, or sold, in whole or in part, by DEALER to any person, firm, corporation, or other entity, whether or not DEALER or any of his employees or agents have any interest in connection therewith. This Agreement shall automatically terminate on DEALER's death. No branch office, sub-dealership, or retail location other than that set forth herein shall be established by DEALER without BELTONE's prior written consent.

Article 11. DEALER shall save harmless and indemnify BELTONE from and against any and all losses, expenses, judgments, claims, costs (including attorneys' fees), and damages arising out of or in connection with any lawsuit in which BELTONE is named as a defendant and which is based upon allegations of misconduct or negligence by DEALER or any of his employees, agents,

or representatives. DEALER shall carry general liability and malpractice insurance in an amount sufficient to cover his normal business operations and shall insure all BELTONE Products in his possession, either on loan or rental from BELTONE, for their current value. BELTONE shall carry product liability insurance and shall save harmless and indemnify DEALER against all claims for patent infringement arising out of his sale of BELTONE Products.

Article 12. DEALER acknowledges that BELTONE is exclusive owner of all right, title, and interest in and to the trademark, "BELTONE", and any other marks which may be used, from time to time during the term hereof, in connection with BELTONE Products and BELTONE Services, and in and to any registrations thereof. DEALER shall acquire no rights in any of said marks by reason of this Agreement or his activities hereunder. DEALER shall do nothing to impair BELTONE's ownership of said marks. Upon the termination of this Agreement, however occurring, DEALER shall cease all use of said marks, including, without limitation, use in his trade name, telephone directories, building directories, advertising, letterheads, literature, signs, listings on office doors and windows, and in any other media of contact with the public. With regard to advertising, DEALER shall not advertise, after termination of this Agreement, any BELTONE Products, new or used, or BELTONE repair service. However, if BELTONE fails to exercise the option set forth in Article 16 hereof and DEALER has not otherwise disposed of the products covered by said option, DEALER shall have the right to advertise said products for a period of thirty (30) days from the date of termination.

Article 13. To insure compliance with his obligations hereunder, DEALER has signed and delivered to BELTONE certain letters set forth in Appendix "A" hereto, and hereby authorizes BELTONE, upon termination of this Agreement, however occurring, to fill in all blanks in said letters, as BELTONE may see fit, and to mail said letters to the designated addressees. DEALER shall be liable for any attorneys' fees and other expenses, which BELTONE may incur in enforcing this Agreement.

Article 14. The waiver by either party hereto of any breach or alleged breach of any provision hereof shall not be construed to be a waiver of any concurrent, prior, or succeeding breach of said provision or any other provision hereof. The invalidity of any provision or provisions hereof shall not, in any way, affect the validity of any other provision hereof or the validity of this Agreement absent such invalid provision or provisions. This Agreement shall, in all respects, be interpreted, construed, and governed by the laws of the State of Illinois.

Article 15. Either party hereto may terminate this Agreement, at any time, upon at least thirty (30) days prior written notice to the other party. However, upon violation of any provision of this Agreement by either such party, the other party shall have the right to terminate the Agreement, immediately, by written notice. Any notice required to be sent to a party under this Article shall be sent, by certified mail, to said party's address specified hereinabove or to his last known business address and shall be effective upon his receipt thereof. Delivery of any such notice shall be presumed to have been made, in any event, by not later than five (5) days after mailing date. DEALER shall make no contracts or commitments, during the thirty (30) day notice period, involving a continued use of the trademark, "BELTONE", by DEALER, including, for example, contracts for telephone directory listings.

Article 16. Upon termination of this Agreement, however occurring, any BELTONE property, such as BELTONE Manuals, operating forms supplied by BELTONE, leads, user names, and equipment and other articles in DEALER's possession, either on loan or rental from BELTONE, shall be returned to

BELTONE immediately. BELTONE shall have the option, at the time of notice of termination of this Agreement by either party or within thirty (30) days after said notice, of purchasing from DEALER, at BELTONE's then-current invoice prices, any unsold, unused, BELTONE Products which DEALER may then have on hand. Further, anything herein to the contrary notwithstanding, in the event that this Agreement is terminated by at least thirty (30) days prior written notice as provided in Article 15 hereof, Beltone shall be required to sell to DEALER during said period of notice only such BELTONE Products, as Beltone may, in its sole discretion, deem to be DEALER's normal requirements, such sales to be made on C.O.D. or cash with order basis, provided, however, that all outstanding balances due to BELTONE have been paid in full. BELTONE shall be under no obligation to repair any BELTONE Products sent to it by DEALER after the date of termination, other than its obligation to the user under its then-current guarantee policies and procedures.

Article 17. All prior agreements between the parties hereto are hereby cancelled.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement at Chicago, Illinois, to be effective as of the day and year set out below.

Date: August 18, 1969

_____ BELTONE ELECTRONICS CORPORATION

DEALER's Firm Name

By _____ By _____

Authorized Signature

_____ _____

Witness: Witness:

Appendix "A"

Office of the Building Date _____

_____

_____

Gentlemen:

We hereby direct you to immediately cancel and remove, at our expense, any of our listings which include the registered trademark, "Beltone", owned by Beltone Electronics Corporation, Chicago, Illinois, from any office directories, bulletin boards, doors, windows, or signs in or attached to the building. Our right to use the trademark has now been terminated.

Very truly yours,
/s/ Hearing Aid Services, Inc.

_____

/s/ E. Allen Thomas - Pres.

_____

Date _____

Gentlemen:

This is to advise you that we no longer have the right to use the registered trademark, "Beltone", in any manner or form in our firm name, in advertising, or in any media of contact with the public. That right, which was granted to us by Beltone

Electronics Corporation, Chicago, Illinois, the owner of the trademark, has now been terminated.

Very truly yours,
/s/ Hearing Aid Services, Inc.
_____
/s/ E. Allen Thomas - Pres.
_____

Appendix "A"

_____ Date _____
Telephone Company

_____

Gentlemen:

We hereby relinquish the right to use, in any way, the registered trademark, "Beltone", in telephone listings or advertisements in any future directories, alphabetical or classified, and direct you to cancel any existing orders from us for such use in any unpublished directories. That right, which was granted to us by Beltone Electronics Corporation, Chicago, Illinois, the owner of the trademark, has now been terminated.

We hereby direct you to transfer the telephone service under telephone number _____ to Beltone Electronics Corporation or to such person, as it may specify. If, for any reason, such transfer can not be accomplished, we direct that such service be cancelled immediately.

Please refund to us any balance remaining in our account.

Very truly yours,
/s/ Hearing Aid Services, Inc.
_____
/s/ E. Allen Thomas - Pres.
_____

ASSIGNMENT

For valuable consideration, receipt of which is hereby acknowledged, and pursuant to the terms of his Beltone Franchise Agreement, the undersigned hereby assigns and transfers to Beltone Electronics Corporation, or its nominee, his entire right, title, and interest in and to the trade style, _____and any other trade style which includes the name, "Beltone", together with all registrations and listings of any said trade style wherever made.

/s/ E. Allen Thomas, Pres.
_____
(Dealer's Signature)

APPENDIX C

Glossary

Authorized dealer or *Beltone dealer* – a hearing aid dealer who, pursuant to a "franchise" agreement or a "dealer agreement" has been appointed by Beltone as a retail dealer for the sale of Beltone products.

HOFE – acronym for Home Office Field Executive - a Beltone employee such as a

Regional Manager or a Division Manager who regularly contacts dealers at the dealers' places of business.

Lead – Beltone lead – the name and address of a prospective purchaser obtained by Beltone through its national advertising and supplied to a dealer.

HAIC – acronym for Hearing Aid Industry Conference – an association of manufacturers, importers, and suppliers of hearing aids, components thereof, and accessories.

consultant – a hearing aid salesman employed by a hearing aid dealer.

area of primary marketing responsibility – the geographic area set forth in the Beltone "franchise" agreement or "dealer agreement" appointing a dealer as a Beltone dealer.

manpower – utilization of consultants by a hearing aid dealer to make house calls on prospects.

"Dear Friend" letter – a letter that Beltone sends to all Beltone users in a particular geographic area announcing the appointment of a Beltone dealer in that area.

PAQ technique – a particular sales presentation that Beltone teaches to Beltone dealers and their consultants.

guarantee registration card – an "IBM" type card that the dealer sends to Beltone giving pertinent information about the sale of a new Beltone hearing aid.

binaural fitting – a fitting of hearing aids for both ears of a user.

"open" area – a geographic area not formally assigned to a Beltone dealer pursuant to a "franchise" agreement or "dealer agreement".

Selectometer – a master hearing aid used to determine the hearing aid to be fitted on a customer.

AVC, AGC – Automatic Volume Control, Automatic Gain Control.

Opinion of the Commission

By Clanton, *Commissioner:*

A. *Introduction*

In this non-price vertical restraints case, Beltone Electronics Corporation, a manufacturer of hearing aids, is charged with imposing territorial and customer restrictions and exclusive dealing requirements upon its dealers. By way of introduction, we note that our concern with this company's distributional practices has a rather protracted history. In a previous proceeding, 52 F.T.C. 830 (1956), the Commission found that Beltone's written agreements with its dealers not to sell the products of other hearing aid manufacturers violated Section 3 of the Clayton Act, 15 U.S.C. 14. The order in that case prohibited Beltone from making future sales on such a condition or "understanding." Shortly thereafter, Beltone reformed its dealer relationships in a manner that appeared at the time to conform with the law. But the apparent conformity did not seem to endure, concerns arose anew and another case was brought in 1973—the one before us now, involving more than exclusive dealing.

As we describe more fully below, the record here indicates that, although unwritten, there exists between Beltone and its distribu-

tors understandings which amount to exclusive dealing and territorial and customer restraints. Nevertheless, since the earlier 1956 proceeding, the law concerning such vertical arrangements has [2] undergone considerable evolution, with the most significant development being the Supreme Court's ruling in *Continental T.V., Inc., v. GTE-Sylvania, Inc.*, 433 U.S. 36 (1977). Our analysis of the issues, in accordance with *Sylvania* principles, convinces us that the restraints in question do not violate the antitrust laws. Before proceeding to that analysis, however, we must describe the parties, the relevant markets and the proceedings below.

1) *Respondents And The Markets*

Respondent, Beltone Electronics Corporation (hereinafter "Beltone"), is a close corporation owned during the period relevant to these proceedings almost entirely by four individuals who were members of a single family. Beltone is incorporated under the laws of the state of Illinois, with its principal office and place of business at 4201 West Victoria Street, Chicago, Illinois. (ID 8)[1]

Beltone is engaged in the manufacture and sale, principally at wholesale to retail dealers, of "Beltone" hearing aids, as well as hearing aid accessories, batteries, and testing equipment. In the course of this business, Beltone ships its products to dealers throughout the United States and engages in national advertising. Thus, Beltone is engaged in "commerce" as the term is used in the Federal Trade Commission Act, 15 U.S.C. 45, and the practices alleged in the complaint in this matter are in or affecting "commerce." (ID 11)

In addition to Beltone, the complaint also named as respondents three individuals, Sam Posen, David H. Barnow and Chester K. Barnow, all officers or directors and principal shareholders of Beltone. On May 17, 1980, without opposition from complaint counsel, the administrative law judge ordered that the complaint be dismissed as to Chester K. Barnow and David H. Barnow. The ALJ recommends that the Commission uphold that order of dismissal (OR

[1] The following abbreviations will be used in this opinion:

ID	– Initial Decision page number
IDF	– Initial Decision finding number
OR	– Order on Remand page number
ORF	– Order on Remand finding number
Tr.	– Transcript page number
CX	– Complaint Counsel's exhibit number
RX	– Respondent's exhibit number
RAB	– Respondent's Appeal Brief on Remand
CAB	– Complaint Counsel's Answering Brief on Remand
RRB	– Respondent's Reply Brief on Remand
COAB	– Complaint Counsel's Original Answering Brief

27), and we do so here. Since Mr. Sam Posen, the remaining individual respondent, is deceased, the Commission hereby dismisses the complaint as to him as well.

There is no dispute about the relevant product and geographic markets in this case. Beltone admits that it is engaged in commerce in the manufacture, distribution, sale and repair of hearing aids and related products. (ID 11) The relevant geographic market in which to judge the effects of the practices at issue is the United States as a whole. [3]

2) *The Charges And Proceedings Below*

Our analysis of the rather complex legal issues is facilitated greatly by a fairly full explanation of the precise acts and practices under scrutiny in this proceeding. On May 8, 1973, the Commission issued a complaint charging the respondents with unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. In particular, the complaint alleged that the respondents have imposed upon Beltone dealers *non-price* vertical restraints which

a) require that dealers sell Beltone products only within assigned geographic territories;

b) require that dealers sell Beltone products exclusively;

c) prohibit dealers from selling Beltone products to unauthorized dealers;

d) prevent others from dealing in Beltone products; and

e) appropriate and use for respondents' own purposes the names and addresses of dealers' own customers. (Complaint Para. 10, ID 3–4)

In addition, respondent was charged with certain unfair acts and practices associated with the contractual consequences of dealer termination, including requiring the return of the names of all Beltone product users and prohibiting the dealer from either using his inventory or advertising Beltone products. (Complaint Para. 11)

On September 2, 1976, Administrative Law Judge Miles J. Brown issued his Initial Decision, concluding that respondents had engaged in each of the enumerated acts and practices (ID 84), that the acts and practices restrained intrabrand competition and, following *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), that the acts and practices were unlawful *per se* and constituted unfair methods of competition and unfair acts and practices in commerce in violation of Section 5. (ID 85) Specifically, he found unlawful foreclosure of other manufacturers from access to Beltone dealers and territorial and customer restrictions that produced *per se* illegal

effects on intrabrand competition. He found a) that Beltone's prices are insulated from competition and b) that the quality of hearing care (a concept discussed below) suffers because Beltone dealers are prevented from fitting their customers with other brands of hearing aids that may be more appropriate. (IDF 59) Further, the ALJ found that Beltone's requirement that terminated dealers remit to Beltone their leads and customer names constituted an unfair trade practice. (ID 82–83) Accordingly, the ALJ issued an order requiring respondents to cease and desist from engaging in these practices and to take certain affirmative steps to prevent their recurrence and remedy their effects. Respondents appealed from the Initial Decision. [4]

After the Commission had received the parties' briefs on appeal and had heard oral argument, but before the Commission had issued a final order in this matter, the United States Supreme Court decided *Continental T.V., Inc., v. GTE-Sylvania, Inc.,* 433 U.S. 36 (1977). That opinion reversed *Schwinn* and held that non-price vertical restraints were not *per se* unlawful but should be judged instead by a rule-of-reason analysis, which takes into account effects on interbrand competition as well as intrabrand competition. Accordingly, the Commission remanded this matter for additional hearings.

On remand, the ALJ confirmed his earlier inference that respondent has indeed imposed each of the alleged restraints and confined himself to collecting evidence of their effects on interbrand competition, of which he acknowledged that the record contains very little. To identify interbrand effects, he analyzed the testimony of eight competing hearing aid manufacturers, with particular attention to entry barriers, the extent of any foreclosure, and the overall economic performance of these firms, including their methods of distribution and pricing. After performing this analysis, the ALJ concluded that the restrictions in question produce adverse effects on both intrabrand and interbrand competition and that they are neither justified by legitimate business purposes nor procompetitive. (OR 25–28)

Respondent now appeals from both the Initial Decision and the ALJ's further findings of fact and conclusions of law.

3) *The Nature And Structure Of The Market For Hearing Aids*

The market for hearing aids is distinctive in many respects. The hearing aid industry possesses many of the characteristics of a health-care service industry, in which the quality of care received depends upon a number of provider services, including testing, fitting and post-fitting consultation to insure the user the maximum

benefit from a hearing aid. (OR 22) Additional services include education and diagnosis of the hearing-impaired individual. These services are generally provided by retail sellers of hearing aids and are usually not priced separately from the hearing instruments.

The record indicates that in 1972, there were about 2.3 million hearing aid users in the United States and an estimated 7.7 million hard-of-hearing persons not using hearing aids. (ID 18) As one might expect, the ALJ found that the vast majority of these hearing-impaired persons are over 60 years of age and less mobile than the population at large. (ID 22)

Because hard-of-hearing persons may tend to hide their handicap rather than seek assistance, the marketing of hearing aids frequently depends upon the discovery and testing of the hearing-impaired and the development of pre-sale and post-sale rapport with the user. Consequently, the hearing aid industry is service-intensive at the [5] retail level. Because hearing aids are generally thought unattractive, call attention to a physical impairment and are associated with aging, normal marketing methods may not result in sales. Dealers must work with potential users before the sale to convince them of the advantages of wearing hearing aids and to achieve proper fitting of appropriate equipment; after the sale dealers follow up to counsel customers on the use of their aids, since hearing aids do not result in immediate improvement of hearing. (CAB 4; Tr. 19828) As is often true in health-care situations, hearing aid purchasers cannot determine for themselves the extent of their hearing loss; instead, they must rely upon hearing aid dealers or professionals to advise them about their hearing impairment and appropriate corrective measures. (OR 22; Tr. 19148).

Fundamentally, this case involves the manner in which Beltone has chosen to market its hearing aids to the hearing-impaired population. Generally speaking, throughout the relevant period, there have been two principal methods of selling hearing aids. They are the more traditional "lead-advertising" method—once the dominant form of marketing and still used by Beltone—and the more recently emerging "professional-referral" method.

Since its founding, Beltone has placed considerable reliance upon the lead-advertising, or "case-finding", method, by which advertisements are placed in local, regional and national media to attract the attention of interested hearing-impaired persons. Such potential customers remove a coupon from the ad and return it to Beltone which, in turn, sends the name and address of the person to the Beltone dealer assigned to the appropriate territory. Each Beltone dealer is to follow up such an inquiry with a personal call upon the

responding customer and to provide him or her with testing and information about hearing impairment and hearing aids. The dealer also requests that the person come to his shop for more thorough fitting of a suitable Beltone hearing aid. In this manner, Beltone acquires "information" about potential customers and seeks out the hearing-impaired. To supplement the leads obtained by the manufacturer, some hearing aid dealers—including Beltone's—do local lead-generation advertising on their own or with a manufacturer's cooperative advertising assistance. (ID 21)

Despite the importance attached to case-finding by Beltone in these proceedings, no Beltone dealer relies exclusively upon manufacturer leads for his business. Dealer-initiated advertising, for example, which is funded by cooperative assistance from Beltone, accounts for a substantial share of Beltone's sales. The ALJ found that Beltone leads (in conjunction with dealer leads) account for only about 25% of its sales. (IDF 48) The remaining sources of respondent's sales include walk-ins, referrals from users, referrals from professionals and user repurchases (an undetermined percentage of which are derived from national leads in the first instance). It is important to lay out such facts in order to lend proper perspective to the high value attributed to lead generation by Beltone. It should also be noted that only [6]about 5% of Beltone's leads result in sales of hearing aids. (CAB 53) For several reasons discussed below, reliance upon the lead-advertising method has recently declined and professional referral has become increasingly important.

The professional-referral method of marketing entails the recommendation of a specific brand of hearing aid to a hearing-impaired person by a hearing professional—a physician or an audiologist. (ID 21) A hearing professional often fits a patient with a hearing aid model from an office inventory of various brands and models, usually left as promotional samples by manufacturers' sales representatives, but the professional usually does not sell the equipment. Instead, he prescribes a particular instrument which the user purchases from a licensed dealer in that brand. When a hearing aid dealer receives an order for a hearing aid specified by a hearing professional, he must treat it as a prescription and may not substitute any other type or brand of product. Consequently, most of the marketing efforts of firms using this method have shifted toward persuasion of hearing professionals and away from direct persuasion of users. Significant impetus was given to this shift in 1977 when the Food and Drug Administration formally ruled that all hearing aid dispensers must advise prospective purchasers to obtain a hearing examination by a physician prior to purchasing a hearing aid. (ORF 12) While the

customer may, under the FDA rule, decline to obtain the examination, he or she must execute a waiver before the hearing aid dealer is permitted to fit and sell an aid. As a result, the trend toward professional referrals is expected to become even stronger. As of 1980, about 40% of all hearing aids were sold through professional referrals (ORF 13), with higher percentages in urban areas.

Beltone has recently attempted to penetrate the professional-referral market but has not yet been successful, in part apparently because audiologists and physicians disfavor companies that sell hearing aids through lead advertising. (ORF 17) Beltone estimates that less than 10% of its aids are presently sold through professional referrals (OR 13–14), compared with the industry-wide share of 40%. Even so, it should be noted that the share of Beltone's sales derived from professional referrals is not *de minimis* and is not very much less than the lowest estimate of its sales attributable directly to national leads. (IDF 48)

More is said later in this opinion about the peculiar marketing needs of hearing aid manufacturers as we evaluate the purposes and reasonableness of Beltone's distributional restraints. But even at the outset, it is clear that certain quasi-medical peculiarities of the product market must be taken into account in such analysis. For example, the ALJ found that despite the substantial retail price of hearing aids, customers (at least first-time users) generally do little or no comparison shopping. (IDF 61) Assuming for the moment that this finding is correct, it suggests that this market may be characterized by significant non-price forms of competition. [7]

Before turning to those market dynamics, a brief word about the structure of this market is appropriate. There are about fifty hearing aid manufacturers selling products in this country, with the top four firms accounting for approximately 50% of U.S. sales and the top eight accounting for approximately 70%. As indicated above, these hearing aid manufacturers compete with each other for the patronage of hearing aid dispensers and for the recommendations of hearing professionals. (ORF 17) Almost all states now have licensing laws governing dispensers of hearing aids, with some states requiring continuous training for them. Apparently, all licensed hearing aid dealers have the basic competence and equipment required to fit virtually any brand of hearing aid (ORF 27), although many dealers do not sell all of the major brands.

B. *ALJ Findings and Conclusions*

1) *Exclusive Dealing*

As mentioned, the Commission found in 1956 that Beltone had

made written contracts for the sale of hearing aids on the condition that its dealers not sell or deal in similar products of competitors, in violation of Section 3 of the Clayton Act. Thereafter, Beltone amended its dealership agreement, purportedly cancelling the unlawful provisions. In doing so, however, Beltone urged its dealers to continue their exclusive attention to one line of products. (ID 14–16) In the present adjudication, the ALJ concluded that Beltone has created an atmosphere of intimidation and coercion which has produced *de facto* exclusive dealing as well as territorial and customer restrictions, even without express agreement. (ID 72)

Beltone's exclusive dealing policy has been sustained primarily through the efforts of supervisory personnel known as "home office field executives," or "HOFEs." While HOFEs have been instructed by Beltone that they may not explicitly require a dealer either to sell Beltone products exclusively or to sell only in his "Area of Primary Marketing Responsibility" (or "APMR"), HOFEs have been permitted to discuss with dealers the value of carrying a single product line and of providing optimal service to customers within an APMR. HOFEs also discuss with dealers the possibility of termination and, while HOFEs have been instructed that terminations cannot be based upon dealers' sales of other manufacturers' products or sales outside APMRs, permissible grounds for termination include "inadequate market penetration." [8]

Beltone dealers are given sales goals, referred to as "potential," for their APMRs. Dealers understand that they are expected to meet these goals as *de facto* quotas, and bonuses are awarded to HOFEs who succeed in raising dealers' levels of potential. (ID 38) The ALJ concluded that Beltone has used the failure to meet potential as a device for terminating or threatening to terminate dealers who breached its exclusivity policy and as a "club to force dealers to adhere to its single-line policy." (ID 39) He also found that the constant pressure to increase their potential caused some dealers to fit a Beltone hearing aid when they knew that another brand would better correct a customer's hearing impairment. *Id.* Several dealers testified that potential simply could not be met unless a dealer devoted his full efforts to promoting Beltone sales and that dealers were advised to stop selling other brands in order to meet potential. *Id.* The HOFEs constantly stressed dealer "loyalty" to Beltone, which ideally manifested itself as a preference for carrying only Beltone products. And, in fact, Beltone's desire that its dealers sell only a single line of products has been predominately honored.

Beltone denies on appeal that exclusive dealing is required of its dealers and contends that the voluntary decision by the majority of

its dealers to devote primary attention to Beltone products is not legally equivalent to exclusive dealing. In support of this contention, respondent points to testimony of dealers, cited by the ALJ (ID 49–50), who believe they provide better service to the hearing-impaired public and keener interbrand competition with full line of a single manufacturer's products. Also, officials of some of Beltone's competitors testified that their wholesale sales representatives do not even try to sell to Beltone dealers because the latter are uninterested in carrying other brands and seem satisfied to deal only in Beltone products. (ID 51) Beltone denies that dealers were coerced into this primary allegiance and it denies having terminated any dealer for failing to meet potential. Beltone further contends that it is legally permissible for a manufacturer to ask dealers to devote their primary efforts to its product. (RAB 19).[2] At bottom, though, Beltone argues that its alleged exclusivity policy produces no measurable adverse effect upon interbrand competition and is, therefore, not unlawful. [9]

As our review of the law will show, the extent of vertical foreclosure has been and remains an important consideration in judging the competitive effects of exclusive dealing. Although the precise degree of vertical foreclosure caused by Beltone's exclusive dealing is not clear from the record, some estimates are available. The ALJ noted in 1976 that Beltone had 370 dealers (ID 23), and in its brief respondent states that it now has 430 (RAB 33), but the number of dealers for all brands in the United States is not certain. A Beltone official testified in 1976 that there were 5,000 dealers nationwide employing 10,000 "consultants" (dealers' salesmen). Beltone's brief also employs the figure 5000. (RAB 32) But other evidence suggests that there were only 5,700 dealers and consultants combined. (RX 85, ID 20, 23) Using the universe figure of 5000, Beltone's dealers constituted only about 7–8% of the nation's hearing aid dealers. Using another basis for measuring foreclosure, the ALJ found that in 1977 Beltone accounted for about 16% of domestic hearing aid sales (in units). (ORF 3)

On remand, the ALJ supplemented his findings with a number of recent developments relating to entry into manufacturing and retailing. He found that, despite Beltone's vertical restraints, barriers to entry into the hearing aid manufacturing are low, as illustrated by the successful entry of Starkey and Nu-Ear since 1972.

[2] Citing *Dilion Materials Handling, Inc. v. Albion Industries*, 567 F.2d 1299 (5th Cir.), *cert. denied*, 439 U.S. 832 (1978), and *United States v. J.I. Case Co.*, 101 F. Supp. 856 (D. Minn. 1951).

At least since the Commission's initiative against exclusive dealing in this industry,[3] all firms have experienced easier access to licensed hearing aid dealers, even including Beltone's dealers.[4] (OR 15) All of the manufacturers now have many outlets, most of them sell to any qualified dealer, (ORF 8) and almost all of them promote their products through professionals and by local advertising [10]that emphasizes dealer services.[5] (OR 15–17) Foreign competition has been vigorous in the last decade, with firms like Siemens and Oticon taking market share away from previously dominant domestic firms.[6] (OR 7, 15) Siemens and Oticon have both grown rapidly and foreign firms now collectively account for about 34% of the market. (OR 7) Some domestic firms' shares have held constant in the 1970's while others have declined. Beltone's experience during this period of entry and growth by other firms is quite clear. Even though it remains the largest firm, Beltone has seen its share of sales slip from 21% in 1972 to 16% in 1977 (OR 15), and it suffered operating losses from 1976 through 1979. (OR 13, RAB 38)

While the ALJ acknowledged that the degree of foreclosure caused by Beltone's exclusive dealing is not great and that "it is difficult to see any direct adverse effect on interbrand competition at the dealer level," (OR 23) he concluded that Beltone's *de facto* exclusivity is unlawful because it raises entry barriers and exacerbates the loss of intrabrand competition caused by customer and territorial restrictions. (OR 24–25) Despite the elusiveness of clear adverse effects from respondent's exclusive dealing, the law judge thought it at least clear that the restriction yields no positive or procompetitive effects. Because of the "peculiar characteristics of this industry," (OR 24) the ALJ concluded that any degree of foreclosure of competitors aborts any possible interbrand benefits that might flow from the restraint. (OR 25)

2) *Territorial and Customer Restrictions*

The ALJ also concluded that Beltone has required its dealers to sell only within exclusively assigned territories except where a

[3] In the last decade, the Commission has obtained consent orders from the following companies: *Sonotone Corp.*, 82 F.T.C. 1802 (1973); *Radioear Corp.*, 82 F.T.C. 1830 (1973); *Dahlberg Electronics, Inc.*, 84 F.T.C. 222 (1974); *Maico Hearing Instruments, Inc.*, 88 F.T.C. 214 (1976).

[4] The products of Oticon, Nu-Ear and Starkey collectively account for 6–7% of Beltone dealers' sales. (OR 21) Further, several manufacturers, including Siemens, testified that they have had no trouble finding outlets and have sold to Beltone dealers. (OR 11) As many as 193 Beltone dealers are on record as having bought and sold other brands. (ORF 35)

[5] As of 1980, the following firms attributed the following percentages of their total hearing aid sales to professional referrals: Dahlberg, 35%; Danavox, 40%; Oticon, 40%. The modern attitude of many firms toward lead advertising is negative: Dahlberg discounts its reliance upon it, and Audiotone and Danavox do not use it because of the professional aversion to the practice. (OR 8)

[6] The foreign firms are recognized for their superior equipment, which undoubtedly accounts for some of their success. (OR 7) ,

dealer has a referral to an outside sale from one of his customers and where post-sale service of the outside customer can be performed by the dealer making the sale. (ID 45) Despite the lack of an express grant of exclusive territories, the ALJ found that the constant emphasis on potential, coupled with a prohibition on branch offices and a policy of supplying leads located only within a dealer's [11] territory, resulted in a *de facto* understanding of territorial exclusivity. In addition, dealers are required to turn over to Beltone any self-generated leads located outside their territories, even if those leads are developed through their own local advertising. He cited testimony by dealers who understand that Beltone will protect their territories from encroachment; in fact, some of those dealers have assisted in policing extraterritorial sales. (ID 45)

The ALJ found further that Beltone dealers understand that they may not sell products to wholesalers or to unauthorized dealers. In support of this, he cited evidence that Beltone has kept records on sales locations and service responsibilities, and has refused to perform out-of-warranty repairs requested by unauthorized dealers. (ID 62)

Beltone denies that it has required or coerced dealers to confine their sales to assigned territories, even though dealers may have respected each others' sales regions. (RAB 21) In Beltone's view, the record shows significant sales by dealers outside their APMRs. Further, it contends there have been no terminations for extra-terrritorial sales between 1973 and 1977. But beyond this, Beltone argues that areas of primary responsibility, even when combined with sales quotas, are not equivalent in law to "airtight" territorial restrictions. (RAB 22) Beltone likewise denies the existence of customer restrictions, arguing that some dealers have sold to wholesalers. Respondent points to the testimony of certain dealers who refused on their own initiative to sell to unauthorized dealers because of their concerns about improper service of the equipment and denigration of Beltone's reputation. (RAB 23) In any event, Beltone argues that it has a lawful right to focus its distribution efforts on the retail, and not the wholesale, level.

3) *Overall Effects Of The Combined Restraints*

The ALJ drew several conclusions about the overall effects of Beltone's combined restrictions. He concluded that Beltone has eliminated intrabrand competition and has effected the following unreasonable restraints on interbrand competition: a substantial portion of the hearing aid market has been foreclosed to competitors,

barriers to entry into retailing and manufacturing have been raised,[7] Beltone has been insulated from price competition, and customers of Beltone dealers are unable to obtain other, perhaps superior, brands of hearing aids. (OR 27–28) However, he found no adverse effects on the quality of the products, dealer support or services to users. (OR 25) The law judge rejected respondent's proffered justifications, saying 1) that Beltone's lead-advertising system [12]reaches no demographic group different from those reached by other firms using other marketing methods, 2) that the training received by Beltone dealers is unexceptional, and 3) that the level of dealer competence to perform repair services is competitively unimportant, since most hearing aid repairs are done by the manufacturer at the factory. (OR 20)

The ALJ based his findings at least partially on evidence that Beltone dealers look primarily to their own costs in setting retail prices. (ID 32, 76–77) Some manufacturers testified that they look at competitors' prices when setting wholesale prices but not at Beltone. (OR 7, 11) Other firms, Beltone and Dahlberg, indicated that they do not look to competitors when setting wholesale prices. (OR 8, 11) Some firms now sell to wholesalers and use quantity discounts to promote sales, while Beltone does not. (OR 16) The record shows only that Beltone hearing aids are priced higher than some brands (TR. 19060) but lower than others. (TR. 20221–22, 20295) The record contains no other evidence of price effects, such as comparisons of the price movements of different brands, cost/profit analyses or strategic planning documents.[8] As for retail-level price competition, while Audiotone and Dahlberg officials testified that hearing-aid customers engage in price-shopping, (OR 9–10) the ALJ concluded otherwise. (OR 22, IDF 61)

According to a theory advanced by complaint counsel, Beltone has taken itself out of competition at the wholesale level—where the demand is quite price-elastic—through exclusive dealing, yet has been able to capitalize on the relative price-inelasticity of demand at the retail level—due to the fact that customers generally do not select their own products—thus allowing the firm to sell its equipment at "excessive" prices.[9] In support of this contention, they cite the testimony of Dahlberg, a major competitor, that its [13] wholesale prices fell immediately after a Commission consent order banned its exclusive dealing. In response, Beltone asserts that there

[7] At another point in his decision, the ALJ found that barriers to entry into both manufacturing and retailing of hearing aids are low. (ORF 6)

[8] The ALJ rejected the testimony of both parties' expert witnesses. (OR 24, ID 77)

[9] Complaint counsel also contend that the territorial restrictions prevent competition among Beltone dealers which might otherwise drive down Beltone's retail prices.

is no evidence that its prices are "high" by any standard, and it emphasizes that its prices include the costs of various services which the prices of other brands may not. Respondent also points to a qualification in the Dahlberg experience: while Mr. Dahlberg testified that after the consent order his company's wholesale prices on hearing aids dropped, he emphasized that the "real price" increased because "the dealer got less . . . software"—in other words, the dealer received fewer valuable support services.[10]

Respondent's justification defense rests heavily on the premise that if it is not allowed to stress dealer attention to APMRs and primary devotion to Beltone leads, the lead-advertising system will not work efficiently, due in part to a free-rider problem affecting dealer incentives.[11] Beltone denies that it requires dealers to sell only Beltone products; what it does require is that dealers sell only Beltone products to Beltone's leads and that the dealers devote their primary energies to promotion of Beltone products, principally through the pursuit of leads. Beltone frankly acknowledges that its dealers are influenced by the incentives built into its marketing system but claims that the freedom of its dealers to sell non-Beltone products is no more constrained than the freedom of other manufacturers' dealers when they respond to equally strong, but different, incentives (such as travel prizes). Regardless of the characterization of these arrangements—as incentives or restraints—respondent ultimately defends its distributional system on grounds that the net effect is not anticompetitive or unlawful under a rule of reason. **[14]**

Complaint counsel, of course, take the opposite view, urging that respondent's restraints are not at all necessary for the preservation of the lead generation system, amount to more than mere selective distribution, depend heavily upon intrabrand restrictions as pay-offs for exclusivity, and produce adverse effects on competition that are not offset by any procompetitive interbrand efficiencies. (CAB 44) They agree with the ALJ that Beltone is insulated from interbrand price competition, and they note that this effect can be seen most clearly in the elimination of competition between non-Beltone dealers and any given Beltone dealer in the region outside the latter's APMR. (CAB 8) As for the foreclosure effect of respondent's

[10] Mr. Dahlberg testified: ". . . the dispener, and . . . the manufacturer . . ., doesn't just sell a hearing aid. He sells a hearing system. And the person we sell it to is part of the system. It is the hardware, it is the ear mold made by a third party usually, it is the interface between the hardware and the user, it is acquainting . . . the user with the hardware; it is re-educating him. Because if he hasn't heard for 30 years, it's re-educating him with the sound he had forgot—he had lost the memory of sound." (Tr. 18729) Testifying about the services that his company dropped, Mr. Dahlberg said, "In an economic crunch, the businessman sheds those costs that will least affect his business. They may be the very things that are most helpful to the user." (Tr. 18732)

[11] Much is made of this linkage between lead generation and the use of these restraints even though lead generation accounts for only a portion of Beltone's sales. Nevertheless, respondent apparently believes that portion constitutes a critical margin that permits the firm to "survive." (RAB 48)

exclusive dealing, complaint counsel acknowledge that barriers to entry are low in this market but insist that they have been lowered only by the Commission's previous consent orders prohibiting exclusive dealing, which only Beltone continues to practice through the coercive use of "potential." (CAB 36) Complaint counsel urge rejection of respondent's justifications, saying that there is no free-riding in hearing aid distribution a) because there is so little retail-level price shopping (as distinguished from wholesale-level competition) and b) because dealers place local advertisements which stress the service and quality of the individual dealer rather than national brand names (and are therefore not susceptible to free riding). (CAB 45)

Complaint counsel attack Beltone's primary justification by saying that selective distribution is not a prerequisite to case-finding and that other manufacturers engage in case-finding and dealer lead development without exclusive dealing in territorial restraints. Complaint counsel propose that by eliminating selective distribution Beltone could still advertise for leads and simply distribute them to its dealers. (CAB 51) According to complaint counsel, Beltone's restraints are unnecessary to create dealer incentives to develop Beltone's leads because it is in the dealers' self-interest to pursue promising leads; in fact, dealers do their own case-finding, which complaint counsel contend is more productive than Beltone's national lead generation. In short, complaint counsel attempt to show that the procompetitive effect of unrestrained dealer lead generation is greater than the procompetitive effect of Beltone's lead generation using the restraints, and thus that Beltone's restraints are not justified. (CAB 54)

Beltone's response to this is to reassert that free-riding is a real threat to the proper promotion of its leads, as evidenced by the testimony of one manufacturer that had to abandon national lead generation when it could no longer employ vertical restraints. (RRB 44) The ultimate result of permitting such free-riding, in Beltone's view, will be an overall reduction in the incentive of all of its dealers to exert the effort required to turn a lead into a sale. Although Beltone denies that it engages in exclusive dealing, it does claim that it is necessary to require dealers to sell Beltone products to Beltone leads. (RRB 46) Respondent urges that the national lead advertising program is not workable without its restraints, which Beltone characterizes as areas of **[15]**primary marketing responsibility and selective distribution. Without these requirements, respondent claims, it would have no assurance of dealer efforts to follow-up leads, due to the effects of free-riding. (RAB 51) Loss of dealer sales

margins would result in reductions in dealership manpower and a decline in the level of service provided by its dealers. (RAB 52) Dealers will advertise less if they expect reduced sales probabilities in their marketing areas, and ultimately free-riding or the threat of it will destroy Beltone's business, respondent contends. (RAB 54) Any limitation on its use of vertical restraints will result in a loss of the effectiveness and efficiency of its whole case-finding effort, on which it concentrates more heavily than any other manufacturer to attract first-time users. (RAB 53)

C. *Commission Findings on Existence of Restraints*

We preface our own findings from this voluminous record[12] with some observations about the changes in the market since the complaint was issued. When this complaint was brought, exclusive dealing appeared to be employed by most of the major hearing aid firms; thus, any new entrant was foreclosed from a substantial majority of the hearing aid dealer population. At that time, professional referrals did not account for a large percentage of hearing aid sales. Today, it is estimated that 40% of all hearing aid sales occur through professional referrals. (ORF 13) In the interim, several new firms have entered the market and grown rapidly to become market leaders. As far as the record discloses, only Beltone arguably continues to employ exclusive dealing; in so doing, it engages about 7 or 8% of the dealers. Multi-line dealers are now the rule rather than the exception, and the evidence indicates that neither established firms nor new entrants have experienced difficulty in finding dealer outlets for their products. Even Beltone has not been completely immune to the trends that have occurred since this case was first brought. Whether as a result of this proceeding, changing market conditions (including professional referrals), or a combination of the two, about 6–7% of Beltone dealers' sales are of other brands. **[16]**

Focusing first on Beltone's territorial policy, we believe that the testimony supports a finding that Beltone sought to maintain territorial exclusivity and that its dealers generally respected each others' territories and rarely sold outside their APMRs or to unauthorized dealers. Although the territorial limitation has not operated in an "airtight" fashion, it is nonetheless effectively eliminated opportunities for competitive activity by Beltone dealers

[12] The trial record reached a volume of over 20,000 pages of testimony by dealers and manufacturing witnesses.

outside their assigned areas. Several selections from the extensive anecdotal evidence bear this out.[13] Although some dealers testified in support of Beltone that they advertised and sold outside their territories without adverse consequences,[14] we conclude that the bulk of the dealer testimony (ID 39–45) shows that dealers understand that they are to sell only within assigned territories. While there was no express agreement to that effect,[15] the pressure to achieve potential, Beltone's distribution of leads only to assigned dealers, and Beltone's policing of sales, all reinforce the dealers' awareness of their territorial exclusivity. (ID 42) We also find that Beltone dealers understand that they are not to sell products to unauthorized dealers or wholesalers, an understanding that is reinforced by Beltone's practice of requiring dealers to file guarantee registration cards and of refusing to do non-warranty repairs on equipment submitted by unauthorized licensed dealers. (ID 58–61) [17]

Turning now to exclusive dealing, we find numerous accounts of dealers who were pressured by HOFEs and threatened with termination for non-Beltone sales; yet few actual terminations were recorded.[16] Nonetheless, our review of the testimony indicates that most dealers who sold competing brands did so on referrals only, although some dealt in other brands for certain specific purposes. In most of the latter cases, either the customers requested another brand or the dealer felt that the Beltone units had failed to correct the impairment.[17] The weight of this testimony establishes that [18]Beltone,

[13] For example, one typical dealer sold outside his APMR only on direct referral. (Tr. 11112) Another testified that he did not sell outside his territory for fear that Beltone would have reprimanded and possibly terminated him. (Tr. 2228) To another dealer, staying in one's territory was an "unwritten law." (ID 44)

[14] One dealer, for example, said that he did not confine his sales, that he advertised city-wide and that Beltone never objected. (Tr. 9607) The ALJ reviewed similar testimony from other dealers. (ID 41)

[15] In the absence of an express agreement imposing vertical restraints, a course of dealing between a seller and buyer may "ripen into an implied or informal agreement or understanding." *Dillon Materials Handling, Inc. v. Albion Industries*, 567 F.2d 1299, 1302 (5th Cir.), *cert. denied*, 439 U.S. 832 (1978), *quoting McElhenney Co. v. Western Auto Supply Co.*, 269 F.2d 332, 337 (4th Cir. 1959). Even so, in *Dillon*, the court found insufficient evidence of such a course of dealing in plaintiff's description of conversations with the defendant's representatives.

[16] One dealer testified that he was terminated for not selling enough Beltone aids. (Tr. 502) Another was terminated after his sales of non-Beltone increased. (Tr. 581) Still another was terminated for failure to sell his potential. (Tr. 2091) Yet another who was terminated claimed that he sold only one non-Beltone on a non-referral basis. (Tr. 4292) One Beltone HOFE told of terminating a dealer for sales of non-Beltones to Beltone leads and for failure to return guarantee registration cards. (Tr. 10160) Another HOFE said that Beltone had instructed him that proof of sale of another brand to a Beltone lead was grounds for termination; he explained that, of those dealers performing poorly, the ones handling competing brands were more likely to be terminated. (Tr. 1785)

[17] For example, one dealer sold a non-Beltone product when two Beltone products had failed to correct a severe hearing loss. (Tr. 1196) Another testified that he began carrying other brands in order to insure the best fit for the customer; he was subsequently terminated. (Tr. 2442) Other dealers who sold non-Beltone on a basis other than referral did so for the following reasons: a customer wanted a feature unavailable in the Beltone line, and a customer was not satisfied with the Beltone aid initially fitted (Tr 17138); a hearing loss was too great for Beltone's line (Tr. 13002); the customer had a preference for a certain fitting unavailable in the Beltone line (Tr. 18043); comparable aids in the Beltone line were not as cosmetically appealing (Tr. 11585; Tr. 12034); customers occasionally requested a particular brand they had seen or heard of or previously used (Tr. 12226, 13175, 14234, 14345); where a dealer sold an occasional non-Beltone, the decision was a combination of his judgment and the

(Continued)

through its HOFEs, used pressure to achieve potential in order to induce dealers to patronize Beltone products exclusively.

Having found that Beltone imposed restrictions effectively amounting to territorial exclusivity and exclusive dealing, we next address the legality of these restraints. We will first consider the relevant case law, which has evolved along somewhat separate paths for these practices, and then analyze the competitive effects in the hearing aid market.

D. *Legal Discussion*

1) *Decisional Precedent*

a) Territorial Restraints

The modern law of vertically-imposed territorial restraints begins with the Supreme Court's opinion in *Continental TV, Inc. v. GTE-Sylvania, Inc.,* 433 U.S. 36 (1977). Prior to *Sylvania,* the law had been the *per se* rule enunciated in *United States v. Arnold Schwinn & Co.,* 388 U.S. 365, 379 (1967):

> Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has departed with dominion over it . . . .

The *Sylvania* Court expressly overruled *Schwinn* and established a rule of reason for all types of non-price vertically-imposed dealer restrictions. It acknowledged that

> the market impact of vertical restricitions is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition. 433 U.S. at 51 [19]

Several types of marketing or distributional "efficiencies" resulting from vertical restraints are cited in *Sylvania* as forms of non-price interbrand competition. As the Court put it,

> Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers. [citation omitted] For example, new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products.

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customer's request (Tr. 13206); one dealer sold an Oticon to see if it performed better than a Beltone, but concluded that it did not (Tr. 13002); and a dealer has sold one Starkey model that he believes is superior to the comparable Beltone aid. (Tr. 14780)

The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called "free-rider" effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did. 433 U.S. at 54–55.

Moreover, the *Sylvania* Court recognized that vertical restraints

may increase output by including demand-creating activity by dealers . . . that outweighs the additional sales that would result from lower prices brought about by dealers' price competition. 433 U.S. at 69 (J. White, concurring). [20]

Thus, the *Sylvania* Court acknowledged the value of non-price forms of interbrand competition, which can be induced through vertical restraints.

At the outset, Beltone's territorial limitation should be properly characterized. Strictly speaking, areas of primary marketing responsibility, without more, are not equivalent to airtight territorial restrictions, *Plastic Packaging Materials, Inc. v. Dow Chemical Co.*, 327 F. Supp. 213, 225 (E.D. Pa. 1971). But it is clear that Beltone's APMRs, as enforced, go beyond mere areas of primary emphasis. Although they are not completely airtight, they have been sufficiently restrictive to inhibit effective competition by Beltone dealers outside their assigned areas. Even so, the lesson of *Sylvania* is that we should judge the overall effects of the restraint by a rule of reason.[18]

Much of the recent law of vertical restraints was made by the Federal Trade Commission under the pre-*Sylvania* standards. Even prior to *Sylvania,* however, the Commission recognized that in some circumstances there may be procompetitive purposes to territorial restraints. For example, in *Adolph Coors Co.,* the Commission described, but reserved judgment on, the following possibility:

Where the manufacturer seeking to impose vertical restraints lacks appreciable market power, it is argued that the [21]damage to intrabrand competition resulting from the vertical restraints may be outweighed by the impetus to interbrand competition resulting from strengthening of the failing or entering firm as a competitive factor in the market. 83 F.T.C. 32, 195 (1974).

The *Coors* opinion itself reflected the impact of two appellate court decisions pre-dating *Schwinn* that had reversed Commission findings of liability for territorial restraints because the Commission had failed to demonstrate that the restrictions were unreasonable under the circumstances. We mention these earlier cases briefly here

[18] Professor Scherer has observed that: "The blunting of intrabrand price competition does not necessarily arouse concern as long as interbrand competition remains vigorous. Whether this condition is satisfied depends mainly upon how entry opportunities are affected." F.M. Scherer, Industrial Market Structure and Economic Performance 587 (2d ed., 1980).

because they seem to possess renewed analytical value since *Sylvania.* In *Snap-On Tools Corp. v. Federal Trade Commission,* the court noted

> that there are certain advantages to a manufacturer . . . in requiring an exclusive territorial arrangement with its dealers which promotes . . . in a broad, meaningful way, competition between it and other manufacturers of similar products, and which therefore justify a minimal curtailment of intrabrand competition among its dealers. 321 F.2d 825, 831–32 (7th Cir. 1963).

The Seventh Circuit was persuaded that the territorial restraint in question was essential to the respondent's particular method of marketing.[19] Another factor influencing the court was that Snap-On-Tools had no monopoly power in the hand tool industry, a market [22]comprised of approximately eighty firms.[20]

The most recent Commission opinion dealing with vertical restraints is *Amway Corp., Inc.,et al.,* 93 F.T.C. 618 (1979). In that case, even though the Commission found *per se* liability under Section 5 for resale price maintenance, it applied a different test, with different results, to Amway's non-price distributional "rules." The Commission found that Amway's rule requiring a buyer's exclusive commitment to one distributor yielded certain efficiencies. The non-price restriction enhanced demand for Amway products, in part because it allowed customers to receive services that were unavailable in stores. When analyzed under a rule of reason, the restriction in question was found to be reasonably related to Amway's ability to recruit distributors and to induce them to provide the requisite services essential to the success of Amway's "unique distribution system." *Id.* at 727.

In recent judicial applications of *Sylvania*'s rule of reason, the courts have demanded more rigorous analysis of the competitive effects of non-price vertical restraints. *Donald B. Rice Tire Co. v. Michelin Tire Co.,* 483 F. Supp. 750 (D. Md. 1980), *aff'd,* 638 F.2d 15 (4th Cir.), *cert. denied,* 102 S.Ct. 324 (1981), involved contract clauses

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[19] The court agreed with the hearing examiner that:

> . . . [T]he practice of exclusive territories for its dealers appears to be the only way in which respondent can be assured that sales territories will be adequately worked, that periodic calls will be made on customers, and that satisfactory service will be rendered customers. *Snap-On-Tools Corp. v. Federal Trade Commission,* 321 F.2d 825, 832 (7th Cir. 1963).

The court also agreed that, in the absence of exclusive territories, it would be almost impossible to determine the particular dealer to whom credit for certain sales was due, which would result in "confusion and chaos." *Id.*

[20] The court also rejected the Commission's finding that, even if the territorial restriction was not unreasonable standing alone, it was unreasonable as an integral part of a system of four types of restrictions. *Id.*

Similarly, in *Sandura Co. v. Federal Trade Commission,* 339 F.2d 847 (6th Cir. 1964), the court held that a manufacturer's assigned territories were economically justified. The system in question there had been initiated to allow the company to attract distributors when it was near bankruptcy and it was perpetuated in order to induce distributor advertising, upon which the firm was heavily dependent as a small firm in a highly concentrated market.

limiting dealers' sales to specified locations and banning dealer pick-up of tires at warehouses outside their assigned areas. Citing *Sylvania*'s recognition of the marketing efficiencies that may result from vertical restraints—such as inducing retailers to engage in promotional activity and to provide service and repair facilities—the district court held that the defendant had used its location restriction to achieve a legitimate purpose, *i.e.,* to sell tires only through dealers who provided specialized services. In addition, the court held that Michelin's 7.9% share of the market did not confer market power, even though Michelin may have possessed some market power in earlier years when it introduced the radial tire. 483 F. Supp. at 761. **[23]**

Other courts have made the point that, to be successful, plaintiffs must establish the overall unreasonableness of the challenged restrictions. In one case, the court observed that vertical restraints might have increased rather than injured competition, since services were an important feature of competition in that market. *Red Diamond Supply v. Liquid Carbonic Corp.,* 637 F.2d 1001, 1006 (5th Cir. 1981). The court also found no evidence of market concentration or market power possessed by the defendant, evidence that, if established, might have suggested that the intrabrand restrictions were adversely affecting interbrand competition. *Id.* at 1005–06. To the same effect is *Cowley v. Braden Industries Inc.,* 613 F.2d 751 (9th Cir.), *cert. denied,* 446 U.S. 965 (1980), in which the court found restraints reasonable in the absence of evidence of injury to interbrand competition and because of the plaintiffs' failure to show any "effective, alternative means to maintain an efficient distributor system." *Id.* at 755.[21]

Complaint counsel have cited *Eiberger v. Sony Corp. of America,* 622 F.2d 1068 (2d Cir. 1980), for the propositions that a) vertical restraints can be deemed unreasonable even if they eliminate or lessen *only* intrabrand competition, and b) the mere provision of some dealer services does not necessarily validate an unreasonable restraint. It is true that, in *Eiberger,* the Second Circuit indeed found no basis in *Sylvania* for the position that adverse intrabrand effects alone cannot support a violation of Section 1 of the Sherman Act. *Id.* at 1081. In striking down Sony's imposition of "warranty fees" on sales outside "territories of primary concentration," the court found the fees bore no relationship to the asserted objective of getting dealers to perform warranty services. In short, the court concluded

[21] *See also, Eastern Scientific Co. v. Wild Hierbrugg Instruments,* 572 F.2d 883 (D.C. Cir. 1978), in which even territorial restrictions enforced by minimum resale prices for sales outside the territories were said to have no greater anticompetitive impact than a purely non-price-oriented policy of territorial restraints, which should be judged by a rule of reason.

that the sole purpose of the warranty fee system was to enforce territorial divisions and customer restrictions. Yet, while giving great weight to intrabrand effects, the court nevertheless did not ignore interbrand effects. Specifically, the court indicated that the restraints appeared to increase prices, not only at the intrabrand level but also in relation to interbrand competition,[22] and it [24] considered, but rejected on evidentiary grounds, defendant's claim of being a new entrant. In addition, in evaluating the proffered justifications, the court seemed to believe that the restraints were imposed more for the protection of the dealers than for Sony's benefit, a factor that, if true, would transform the vertical character of the restraints into horizontal arrangements. At bottom, however, the court's consideration of interbrand effects appears largely limited to determining whether the restraints exerted a procompetitive influence on interbrand competition, and not whether there were adverse interbrand effects.

The *Eiberger* decision must be read in conjunction with a contemporaneous opinion by another panel of the Second Circuit, *Borger v. Yamaha International Corp.*, 625 F.2d 390 (2d Cir. 1980). There, the Second Circuit held it reversible error for a jury to be instructed to find Yamaha liable for violating Section 1 solely on the basis of a purpose to restrict intrabrand competition, without a finding of either purpose or effect relating to interbrand competition.[23] The *Borger* court analyzed the *Oreck* decision, n. 23 *supra*, which was distinguished in *Eiberger*, and reaffirmed *Sylvania*'s emphasis on interbrand effects. *Id.* at 396–97.[24] [25]

From this review of the case law, it is quite evident that the courts in the post-*Sylvania* era have closely adhered to the Supreme Court's concern with the effect of vertical restrictions on interbrand competition. It is also clear that in analyzing the effects of vertical restraints, the courts have regarded market definition as a crucial

[22] Higher intrabrand prices, of course, do not necessarily mean that the restraints are anticompetitive since the restrictions, by inducing more information and services, add value to the ultimate product offered for sale.

[23] The question of whether intrabrand injury alone can sustain a Sherman Act violation appears to have split the Court of Appeals for the Second Circuit. In *Oreck Corp. v. Whirlpool Corp.*, 563 F.2d 54, 58 (2d Cir. 1977), the trial court had instructed the jury that if it found an agreement between Whirlpool and Sears to exclude Oreck (a distributor competing with Sears), it could find a violation based upon the unreasonable intrabrand purpose and effect, without more. A divided panel of the court of appeals reversed, holding that the plaintiff had to show that the net effect of such conspiratorial conduct was anticompetitive in the market as a whole. *Id.* The court *en banc* upheld the panel majority, 579 F.2d 126, 133 (2d Cir.), *cert. denied*, 439 U.S. 946 (1978).

Recently, while characterizing the view of the Fifth and Ninth Circuits as holding that the balance tips in the defendant's favor if the plaintiff fails to show that the defendant has significant market power—and adopting this view as its own—the Court of Appeals for the Seventh Circuit observed that "[t]he Second Circuit seems divided on the question. Compare *Oreck Corp. v. Whirlpool Corp.* (citation omitted) with *Eiberger* (citation omitted)." *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 1982-2 Trade Cases (CCH) ¶64,744 at 71, 609 (7th Cir. May 21, 1982).

[24] Other courts have taken a similar view of the importance of interbrand effects. *Copy-Data Systems, Inc. v. Toshiba America, Inc.*, 633 F.2d 405 (2d Cir. 1981); *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292 (5th Cir. 1981); *Abadir v. First Mississippi Corp.*, 651 F.2d 422 (5th Cir. 1981.).

prerequisite. *See Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. 320, 327–29 (1961). At the same time, the courts are not accepting unquestioningly the business justifications advanced in support of particular restraints, *e.g., Donald B. Rice Tire Co.; Eiberger.* What is less clear is the kind of competitive analysis that should be undertaken in individual cases, including the process of balancing intrabrand and interbrand effects. Some courts have looked to such interbrand considerations as market concentration and firm market power, *e.g., Red Diamond, Muenster Butane, Inc., Donald B. Rice Co.,* and *Valley Liquors, Inc. v. Renfield Importers, Ltd.,* 1982–2 Trade Cases (CCH) ¶64,744 at 71,609 (7th Cir. May 21, 1982), but the substance and procedural posture of many of the cases have not always necessitated a detailed competitive analysis. We will examine these issues more fully below in the context of this case.

b) Exclusive Dealing

Exclusive dealing arrangements may, as here, take the form of a contract under which a purchaser promises not to buy products from the seller's competitors, or it may take the form of a requirements contract. Unlike territorial restraints, exclusive dealing has at no time been considered *per se* illegal, although the standards of proof have not always been especially stringent. This approach simply reflects the courts' long-standing recognition that exclusive dealing may have procompetitive effects and purposes. *Standard Oil Company of California v. United States,* 337 U.S. 293, 306–7 (1949); *Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. 320, 329 (1961).

Since the earliest cases on exclusive dealing arrangements, the emphasis has been mainly on the degree of market foreclosure caused by the restrictions. Although the courts have not relied exclusively on foreclosure as a test of competitive effect, they have consistently focused on it. During the early judicial development of the law on this particular vertical restraint, violations were established with only a minimal showing that a substantial amount of commerce was involved in the contracts. More recently, however, the courts have employed a fuller rule-of-reason analysis, which takes into account not only the market share of the firm but the dynamic nature of the market in which the foreclosure occurs. [26]

In its earliest case under Section 3 of the Clayton Act, the Supreme Court considered a manufacturer's requirement that distributors, who constituted 40% of the retail outlets for the product, refrain from handling competing manufacturers' products. Without lengthy explanation, the Court announced that the test for exclusive dealing was whether the foreclosure would "probably lessen competition or

create an actual tendency to monopoly." The Court also made the following observation:

> That [Section 3] was not intended to reach every remote lessening of competition is shown in the requirement that such lessening must be substantial. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 357 (1922)

The Court decided that a 40% foreclosure of the outlets available to pattern manufacturers would clearly have the prohibited "substantial" effect.[25]

Later, in a landmark opinion on Section 3, the Court searched painstakingly for a rule of law that would permit more comprehensive analysis of the competitive effects of particular practices covered by that statute. *Standard Oil Company of California v. United States,* 337 U.S. 293 (1949), [hereinafter *"SOCAL"*] involved requirements contracts between a gasoline refiner and independent service stations. The issue was whether, when applied to requirements contracts, the "lessening of competition" clause in Section 3 required a showing of probable diminution of competitive activity or merely a showing that a substantial portion of commerce was "affected" (meaning "involved"). Facing the Court was the recent Section 3 precedent of *International Salt Co. v. United States,* 332 U.S. 392, 396 (1947), which rested a violation for tying arrangements on a "substantial foreclosure of a volume of business that is not insignificant." In an effort to craft a separate analysis for requirements contracts, the five-member majority reviewed all eight of the Court's prior decisions on Section 3. In five of those, violations were found, three of which involved tying arrangements[26] and two of which involved requirements contracts.[27] But the Court found nothing in those precedents that would justify confinement of the *International Salt* standard to tying agreements. The restricions in each of those [27]cases quite clearly affected a significant part of the market—with foreclosures ranging from 100% to about 40%.[28] 337 U.S. at 302. The fact that SOCAL's market share was not as great as the shares in the earlier cases, however, did not reduce antitrust concern, in the view of the Court, since SOCAL might have

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[25] This early opinion of the Court has been criticized for its failure to provide "either an exposition of the dynamic consequences of arrangements like the one before it or implications about where the borderlines between legality and illegality may lie." L. Sullivan, *Antitrust* 472 (1977).

[26] *United Shoe Machinery Corp. v. United States,* 258 U.S. 451 (1922); *International Business Machines Corp. v. United States,* 298 U.S. 131 (1936); *International Salt Co. v. United States,* 332 U.S. 392 (1947).

[27] *Fashion Originators Guild of America v. FTC,* 312 U.S. 457 (1941); *Standard Fashion Co. v. Magrane-Houston Co.,* 258 U.S. 346 (1922).

[28] Although there were no findings of foreclosure levels in any of the cases which were dismissed, in each one the Court found that the tie-ins or exclusive contracts produced no conceivable illegal effect. *FTC v. Sinclair Refining Co.,* 261 U.S. 463 (1923) (limiting gasoline sold through pumps); *Pick Mfg. Co. v. General Motors Corp.,* 80 F.2d 641 (7th Cir. 1935), *aff'd,* 299 U.S. 3 (1936). (limiting dealers to GM parts).

maintained its share, however small, by the use of vertical restraints, forestalling the loss of market share to new entrants. If such were the case, said the Court, the efficiencies that SOCAL had achieved through its requirements contracts might not save it from liability. 337 U.S. at 309. Thus, finding the absence of market dominance an unreliable indicator and ultimately deciding that "serious difficulties" attended "various tests of the economic usefulness or restrictive effect of requirements contracts," *Id.* at 308, the Court concluded

> that the qualifying clause of §3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce. *Id.* at 314.

Applying this test to the evidence that SOCAL accounted for 23% of the gasoline sales in the relevant market and that its requirements contracts tied up 16% of the independent stations, which sold 6.7% of the gasoline in the market, the Court found a violation of Section 3.[29] [28]

The *SOCAL* substantiality test prevailed until it was reexamined by the Supreme Court in 1961.[30] One of the most significant lower court applications of the test arose out of a Commission decision very similar to the instant case, and it is instructive to contrast its perspective with more recent views of vertical restraints. In *Dictagraph Products,* 50 F.T.C. 281, 295 (1953), *aff'd sub nom., Dictagraph Products v. Federal Trade Commission,* 217 F.2d 821 (2d Cir. 1954), the Commission found that a hearing aid firm's contracts prohibiting its dealers from selling competing brands of products, enforced by intimidation and actual terminations which triggered one-year covenants not to engage in the hearing aid business, tied up a substantial fraction of the established retail outlets (22%), affected a substantial volume of business and tended substantially to lessen competition, all in violation of Section 3 of the Clayton Act. Dictagraph was one of the top three firms in the market and, according to the Commission, it controlled a "substantial number" of dealers and had probably maintained its market position over time by use of exclusive dealing. Even so, overall interbrand competition had actually increased in the relevant period, in that the number of manufacturers had increased, and new entrants had experienced no trouble establishing themselves with dealers.

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[29] Of interest to us in the present case is the way that the method of competitive analysis began to evolve from that in *Standard Fashion.* Although ultimately adopting a simplified legal standard, the Court in *SOCAL* considered a broader range of structural features of a well-defined relevant market, including the fact that SOCAL's six major competitors, accounting for 42% of the market, also employed exclusive dealing (requirements) contracts, while only 2% of the independent stations in the market operated split (multi-brand) pumps. *Standard Oil Company of California v. United States,* 337 U.S. 293, 295–96 (1949).

[30] *See Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. 320 (1961).

Reviewing the Commission's decision, the court of appeals held that it was never appropriate to consider business justifications for vertical restrictions under Section 3. 217 F.2d at 824 *et seq.* Dictagraph had raised as a justification for its restraints the need to protect its investment in engineering and research (as well as goodwill and reputation) and its attention to the individual needs of hard-of-hearing persons through product improvement and training. It argued that the quality of its services to the public would be diminished if its dealers were allowed to [29]devote less than full attention to Dictagraph products.[31] *Id.* at 824–5. The court in *Dictagraph* found *SOCAL* totally dispositive of the proffered justification defense, since in its view *SOCAL* had implicitly affirmed the lower court's exclusion of evidence of the economic merits of SOCAL's marketing system, *i.e.,* evidence of efficiencies. *Id.* at 825. The court also rejected Dictagraph's "public interest" justification, which was based on benefits rendered to the hard-of-hearing through Dictagraph's services. Nonetheless, the court made the following observation about Dictagraph's claim that it needed the restraints in order to protect investments in customer lists and company leads:

> The furnishing to petitioner's distributors of names and addresses of users of the Acousticon hearing aid in their territories, together with additional names and addresses of prospects obtained through the use of various advertising media . . . would seem to be the legitimate property of petitioner. Nothing in the cease and desist order now before us for review would seem to prevent petitioner from protecting itself against the use of such data and material in the sale of the products of competitors. *Id.* at 829.

This acknowledgement is noteworthy, for it touched some of the very issues before us now. The court seemed to recognize that in limited circumstances it is justifiable for a manufacturer to [30]fashion its distribution system in a manner that protects its competitive interests.[32]

In the exclusive dealing cases that followed *SOCAL,* the demarca-

[31] In its *Dictagraph* opinion, the Commission made several findings about the hearing aid market that are comparable to the present case:

> The nature of this market is such that to sell effectively potential users of hearing aids must be sought out and convinced of the advantages of hearing aids to them . . . many persons will not shop for this product. Well-established distributor accounts . . . concentrate their sales forces on locating and selling such potential users. In this manner a market is reached which is not accessible to accounts selling across the counter only. 50 F.T.C. at 294.

[32] Even contemporaneously with the *Dictagraph* opinion, the Commisson seemed to recognize that application of a quantitative substantiality test should be tempered by analysis of dynamic factors affecting the significance of the foreclosure. In a companion case, *The Maico Co., Inc.,* 50 F.T.C. 485 (1953), the ALJ had excluded evidence of an increase in the number of competitors, an increase in the volume of competitors' business, a decline in the respondent's small market share. The Commission remanded his finding of a Section 3 violation for consideration of such evidence, saying that only exclusive dealing that lessens or will probably lessen competition is unreasonable or unlawful. *Id.* at 488

tion between lawful and unlawful percentages of market foreclosure varied, rendering the substantiality "rule" quite imprecise. In *Mytinger & Casselberry, Inc. v. Federal Trade Commission,* 57 F.T.C. 717 (1960), *aff'd,* 301 F.2d 534 (D.C. Cir. 1962), foreclosures of 61%, 34% or 8.6% of the three product markets alleged were all regarded as "substantial." The Commission held that Section 5 required only a showing of *potential* to impede a substantial percentage of the relevant lines of commerce. The affirming court distinguished that test from either a showing based upon "the mere volume of business" or a showing based upon "the actual impact which a . . . contract has on competition." 301 F.2d at 537–38. Although the Supreme Court had decided *Tampa Electric, infra,* by then, the *Mytinger & Casselberry* court simply distinguished Tampa Electric's foreclosure of only 0.77% from Mytinger & Casselberry's 8.6% or more. *Id.* at 539.

The Supreme Court reconsidered its quantitative substantiality test in *Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. 320 (1961), which involved a declaratory judgment and enforcement action on a requirements contract. After reviewing its earlier decisions, the Court characterized the substantiality test in the following fashion:

> it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to [31]the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein. *Id.* at 329.

Applying the test to the Tampa Electric contract, the Court found that the arrangement foreclosed only 0.77% of the relevant market, a clearly insubstantial amount. In so holding, the Court noted that the respondent coal company was not a dominant seller nor was there an industrywide practice of exclusive dealing, features which distinguished the case from the *Standard Fashion* or *Standard Oil* cases. The Court also took into account particular features of the market that made the contractual arrangement efficient and desirable. *Id.* at 334.

While *Tampa Electric* emphasized the importance of market definition and expanded somewhat the range of analysis of exclusive dealing, it provided little specific guidance about either the threshold percentage of foreclosure that should trigger antitrust concern or the relative importance of other market considerations. The analysis of lower court decisions following *Tampa Electric* is complicated to some extent by a line of cases that might be read to establish under Section 5 a different rule than that under Section 3.

Perhaps the most significant of these cases was the earliest, *Brown Shoe Co., Inc.*, 62 F.T.C. 679 (1963), *rev'd sub nom. Brown Shoe Co. v. Federal Trade Commission*, 339 F.2d 45 (8th Cir. 1964), *rev'd* 384 U.S. 316 (1966). In that case, Brown's franchise program required retailers to devote their primary attention to Brown's lines of shoes and to sell no "conflicting" lines. Customers who agreed to the exclusive dealing program were rewarded with "special treatment" from the manufacturer, which included architectural plans, field representative services, merchandising records sales training, accounting assistance, displays and national meetings. The Commission determined that Brown's competitors had been foreclosed from that portion of the dealer market represented by Brown's 766 dealers and that the foreclosure was significant. Brown argued that its dealers accounted for only 1% of the nation's 70,000 retail shoe stores and that, by *Tampa Electric* standards, such foreclosure was insignificant. The Commission's response to this, which was upheld, was simply that *Tampa Electric* was distinguishable as a Section 3 case, with a higher standard of proof than that required by Section 5. But even this seeming departure from the *Tampa Electric* Section 3 test is ambiguous since the Commission was also influenced [32]by the shoe industry's structure[33] and by a recent Supreme Court decision condemning a 1% vertical foreclosure resulting from a Brown Shoe merger.[34]

Little further precision was added to the concept of "substantial foreclosure" in subsequent Commission cases. In *Luria Bros and Co., Inc. v. Federal Trade Commission*, 389 F.2d 847 (3d Cir.), *cert. denied*, 393 U.S. 475 (1968), an exclusive scrap iron broker unlawfully foreclosed either 21% or 34% of the business of steel mills, depending upon the market definition, but the charge there hinged on an incipient Sherman Act violation, and Clayton Section 3 standards were not mentioned by the court. In *L.G. Balfour Co. v. Federal Trade Commission*, 442 F.2d 1 (7th Cir. 1971), exclusive dealing contracts with 90% of the buyers in the relevant market were found to confer unlawful monopoly power, but the reviewing court reserved judgment on whether the arrangements would violate Section 5 absent the showing of monopoly power. And in *Adolph Coors Co.*, 83 F.T.C. 32 (1974), *aff'd sub nom. Adolph Coors Co. v. Federal Trade Commission*, 497 F.2d 1178 (10th Cir.), *cert. denied*, 419 U.S. 1105 (1974), which involved both exclusive dealing and territorial restrictions adjunct to price fixing, the Commisison

[33] Among about 1000 manufacturers, the five largest held 24% of the market. Brown ranked second or third, and the trend was toward vertical integration or foreclosure of small firms' access to retail outlets by larger firms' franchise programs. 62 F.T.C. at 719.

[34] *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

dispensed with finding the percentage of outlets foreclosed, holding that under Section 5, when a firm has market power—as Coors did—it cannot lawfully foreclose competitors from outlets.[35]

Looking at more recent exclusive dealing cases decided under Section 3, we find only a slightly clearer dividing line between lawful and unlawful foreclosure. In one, foreclosure of 10–15% of the dealer population was sufficient to withstand a motion for a directed verdict, although in the court's view that level of foreclosure did not "compel a finding of substantiality" and might [33]be proven insignificant. *Cornwell Quality Tools Co. v. CTS Co., Inc.*, 446 F.2d 825 (9th Cir. 1971).[36] In another, the district court had found a foreclosure of 14.7% substantial and unlawful, but the appellate court reversed on the lower court's failure to consider whether the impaired competition was significant within the total context of interbrand competition in the industry. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir. 1975).[37] The court indicated that Holiday Inns' 14.7% foreclosure might violate Section 3 standards, but it could not say because of the evidentiary deficiencies.[38] Other courts have held that foreclosures of less than 1%, *Magnus Petroleum Co., Inc. v. Skelly Oil Co.*, 599 F.2d 196, 204 (7th Cir. 1979), and less than 5%, *JBL Enterprises, Inc. v. Jirmack Enterprises, Inc.*, 509 F.Supp. 357, 379 (N.D. Cal. 1981), were insufficient to violate Section 3. Additionally, in a Section 1 case, the court found that a 24% foreclosure of the relevant market and a continuing pattern of obtaining exclusive contracts of unreasonable duration constituted an unreasonable restraint of trade. *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.*, 676 F.2d 1291 (9th Cir. 1982). [34]

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[35] Citing only *Federal Trade Commission v. Brown Shoe Co.*, 384 U.S. 316 (1966), the court of appeals affirmed the Commission's conclusions on exclusive dealing. *Adolph Coors Co. v. Federal Trade Commission*, 497 F.2d 1178 (10th Cir.), *cert. denied*, 419 U.S. 1105 (1974).

[36] More recently, Section 3 exclusive dealing charges have withstood a motion to dismiss because the court saw possibility of foreclosure of 100% of the relevant market as it was defined. *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1375 (10th Cir. 1979).

[37] Significantly, the district court had failed to consider the size and number of firms in the market, the foreclosure effect on other firms, the use of the restraint throughout the industry, or the economic justifications for the restraint.

[38] Because Section 3 of the Clayton Act applies only to sales of goods, not services, the plaintiff in this case charged only that the exclusive dealing violated Section 1 of the Sherman Act. Nevertheless, Clayton Section 3 standards were compared. While the appellate court did not find a violation on the basis of the foreclosure alone, it nonetheless found Holiday Inns liable under Section 1 for the combination of exclusive dealing and reservation of certain towns for company-owned motels.

It should be noted that the court in *Holiday Inns* would not require a firm to use the least restrictive vertical restraint to achieve its purposes. In its view, the test should be whether the restriction is "fairly necessary" under all the circumstances or whether it exceeds the limits of restraint "reasonably necessary" to protect the defendant. *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230, 1248–49 (3d Cir. 1975). The court distinguished holdings of other circuits to the contrary, *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), and *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975), both of which involved *per se* illegal restraints.

It is rather obvious from this survey that the foreclosure standards for judging exclusive dealing are not well settled. And, even if a relatively clear foreclosure guideline had been established before *Sylvania,* today it would remain only one of several variables to be weighed in the rule-of-reason analysis now applied to all nonprice vertical restraints, under both Section 3 of the Clayton Act and Section 5 of the FTC Act. More specifically, a proper analysis of exclusive dealing arrangements should take into account market definition, the amount of foreclosure in the relevant markets, the duration of the contracts,[39] the extent to which entry is deterred, and the reasonable justifications, if any, for the exclusivity.

If, as the precedents seem to suggest, the degree of foreclosure caused by the exclusivity indicates without serious doubt that the party imposing exclusive contracts possesses substantial market power, then that foreclosure will be a more significant factor of the case against the restraint. Where the degree of foreclosure is less substantial, other measures of market performance are more likely to determine the overall effect of the restraint on competition. As we note below, because Beltone's degree of foreclosure is neither clearly *de minimis* nor clearly indicative of significant market power, it is necessary for us to undertake a fuller analysis of complaint counsel's proof relating to other market factors and respondent's proffered justifications. [35]

Having reviewed the relevant case law on exclusive dealing and territorial restrictions, we turn our attention to consideration of the competitive effects in the hearing aid market. The analysis that follows takes account of the recent literature on the subject of vertical restraints as well as the current judicial framework.

2) *Analysis of Competitive Effects*

In returning to a rule of reason analysis for non-price vertical restraints,[40] the *Sylvania* decision emphasized two points: (1) that all such restraints, regardless of form,[41] can serve legitimate procompetitive purposes, and (2) that interbrand considerations are of primary

[39] The length of time that competitors are foreclosed by exclusive transactions has been an important element in the evaluation of such contracts. Professor Sullivan, for example, believes that the longer the exclusive dealing arrangement, the more likely it is that its restrictiveness outweighs any efficiencies or justifications associated with it. L. Sullivan, Handbook of the Law of Antitrust 485–86 (1977). In a recent decision, exclusive contracts longer than ten years were deemed unreasonable in terms of foreclosure and duration and unjustified by a need to recapture investments. *Twin City Sportservice, Inc. v. Charles O. Finley & Co., Inc.,* 676 F.2d 1291, 1305 (9th Cir. 1982). *But see Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. 320, 334 (1961), in which the Supreme Court indicated that a 20-year contract could be reasonable.

[40] *See White Motor Co. v. United States,* 372 U.S. 253 (1963).

[41] While the *Sylvania* Court recognized the potential of non-price vertical restraints, it noted the different treatment of price restrictions. "The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy." *Continental T.V., Inc. v. GTE-Sylvania, Inc.,* 433 U.S. 36, 51 n. 18 (1977).

importance. However, in the aftermath of that decision, several unanswered questions remain. For example, what significance should attach to the degree to which vertical restraints inhibit competition? What are the most relevant interbrand considerations? How do we balance intrabrand and interbrand effects? As discussed previously, these and other issues have been addressed to some extent in lower court decisions interpreting *Sylvania* and by a variety of commentators.

Recent literature reflects diverging views over how to structure the rule of reason analysis called for in *Sylvania*. Some commentators urge continued close scrutiny of vertical restraints, believing that excessive promotion of non-price competition bears many of the characteristics of cartel-like behavior,[42] that well-established firms and less complex products do not require the support of severe distribution restraints[43] and [36]that less restrictive alternatives are frequently available.[44]

Other commentators advocate a much more lenient approach toward vertical restraints.[45] Under this view, a manufacturer, acting in its own interest, will restrict dealer competition only to the extent necessary to induce the optimal level of servies—that is, to ensure that non-price competitive efforts by distributors will increase until the marginal cost of those efforts matches the associated increment in resale price. Instead of restricting output, these commentators contend that distributional restraints generally enhance output by encouraging more intensive market penetration and demand-generating activities.[46] They also decry efforts to search for less restrictive alternatives as essentially fruitless second-guessing that will only result in the substitution of less efficient marketing schemes. Under this approach, the only real concern of vertical restraints is whether they contribute to dealer or manufacturer cartels. Where that occurs, the proper approach according to these commentators is to

[42] Pitofsky, The *Sylvania* Case: Antitrust Analysis of Non-Price Vertical Restictions, 78 Col. L. Rev. 1, 19 (1978).

[43] *Id.* at 20. Professor and former Commissioner Pitofsky holds the view that some vertical restraints may produce sufficient demonstrable economic harm to be regarded as *per se* illegal, notwithstanding *Sylvania*.

[44] L. Sullivan, Handbook of the Law of Antitrust 414 (1977). From Sullivan's point of view, a manufacturer could achieve any marketing goal, such as the provision of services at the dealer level, by means less restrictive than vertical restraints.

[45] R. Bork, The Antitrust Paradox 288 (1978); Posner, The Next Step in the Antitrust Treatment of Restrictive Distribution: *Per Se* Legality, 48 Chi. L. Rev. 1 (1981). Both of these commentators would treat distributional restraints as *per se* legal. In the absence of *per se* legality, Professor, and now Judge, Posner would favor antitrust scrutiny only for vertical restraints employed by firms possessing significant market power. *Id.* at 6.

[46] This view contrasts sharply with an earlier belief that vertical restrictions encouraged wasteful forms of promotion that reinforced artificial product differentiation and inelasticity of demand for the promoted products. Posner, The Rule of Reason and the Economic Approach: Reflections on the *Sylvania* Decision, 45 Chi. L. Rev. 1, 4 (1977). *See* Comanor, Vertical Territorial and Customer Restrictions: *White Motor* and Its Aftermath, 81 Harv. L. Rev. 1419 (1968); *see also* Sullivan at 414.

proceed under a conventional conspiracy theory, not to rely on any kind of vertical analysis.

Another approach advanced is to treat vertical restraints as presumptively legal, unless it can be shown that the restrictions are being used strategically to increase competitors' costs.[47] Such a showing, presumably, could be made only with respect to [37] dominant or colluding firms, since all others attempting such strategies would fail. This view is premised on the primacy of a manufacturer's interest in influencing the level of services provided by its dealers. And, since a manufacturer cannot assuredly satisfy all customer preferences for different levels of service, it should have the right to satisfy the largest number if that is what it (the manufacturer) regards as the efficient thing to do.[48] One reason why a manufacturer may regard a system of vertical restraints as efficient is that the arrangements may economize the "transaction costs" of product distribution, such as dissemination of information to exploit and market a new technology.[49] Other distribution efficiencies may include (a) insuring continued product quality after the sale, and (b) avoidance of the costs of policing contracts with dealers to perform specific pre-sale or post-sale services.

From the brief foregoing review, it is clear that commentators on the *Sylvania* decision have no unanimous view of the relative weights to be afforded intrabrand and interbrand considerations in a rule of reason analysis of non-price vertical restraints. Most recognize that these restrictions can enhance competition, at least under certain circumstances, with the principal areas of disagreement centering on the significance of the competitive impact and the suitability of alternative distribution strategies. Our analysis below will focus on interbrand effects and the contribution (positive or negative) that the restraints at issue here make to that level of competition.

In considering the negative impact on interbrand competition in this context, it is important to clarify that what we are concerned about are horizontal effects at either the manufacturer or dealer level. These effects can be manifested in several ways: a) as actual collusion among competitors which increases prices and restricts

[47] Williamson, Assessing Vertical Market Restraints: Antitrust Ramifications of the Transactions Cost Approach, 127 Pa. L. Rev. 953, 993 (1979).

[48] By contrast, Sullivan would leave the matter entirely to the marketplace and let customers choose among competing levels of dealer service, despite a manufacturer's specific interbrand competitive goals. Sullivan at 414.

[49] If customers were fully knowledgeable about a product's attributes, the manufacturer could simply announce that it was available and all who have a need or desire for it would come to transact business. But no such perfect knowledge exists. Instead, a premium price which covers the costs of dealer services is often justified when a customer's time in coming to and completing that transaction is economized, when his search time is reduced and when the product is reliably serviced. *See* Williamson, Assessing Vertical Market Restraints: Antitrust Ramifications of the Transactions Cost Approach, 127 Pa. L. Rev. 953, 976–77 (1979).

output; b) as an increased likelihood of anticompetitive interdependent behavior or oligopolistic pricing which yields results similar to collusion; or c) as enhancement or creation of market power on the part of one or more sellers. [38]

The most extreme case—where restraints directly facilitate horizontal collusion—can often be dealt with as a traditional horizontal conspiracy, as noted above. An example would be a dealer-inspired cartel which is manifested in the form of vertical territorial restrictions.

The second category of effects—where vertical restraints increase the likelihood of collusion or interdependent behavior—may not be amendable to horizontal price-fixing theories, because the restraints contribute to interdependent behavior in subtler ways than cartels.[50] Such effects may occur in markets which are conducive to coordinated behavior. Factors such as concentration, barriers to entry, the homogeneity of products, the degree of excess capacity and the growth in demand will help to indicate the degree to which the market is susceptible to anticompetitive interdependent behavior. Where such conducive market conditions are shown, the legality of the restraints will depend upon the degree to which intrabrand competition is restrained and whether that loss contributes to or is otherwise significant in light of the extent of interbrand competition. If interbrand competition is vigorous, as evidenced by a large number of sellers, modest or low levels of concentration, and modest or low barriers to entry, the loss of intrabrand competition is not likely to be significant. On the other hand, if markets are highly concentrated, barriers to entry are high and other factors indicate a market highly susceptible to interdependent behavior or collusion, even less than airtight territorial restrictions, for example, might harm competition. [39]

In the third category of cases, typically exclusive dealing situations, we are concerned primarily with restraints that may increase the costs of entry and reduce opportunities for new entrants to distribute their products, making it more difficult to open up less-than-competitive markets. If barriers to entry are heightened in this way, vertical restraints may preserve or enhance the market power of existing firms and shelter or facilitate collusion or coordinated

[50] The more hostile antitrust treatment of resale price maintenance is premised on the greater potential for that practice to facilitate price monitoring and coordination at the interbrand level. In addition, it has been argued that resale price maintenance promotes distributional inefficiency by encouraging proliferation of outlets without regard to economies of scale or other cost considerations. Fair Trade Laws: Hearings on S. 408 (Consumer Goods Pricing Act of 1975) Before the Subcommittee on Antitrust and Monopolies of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. 49 (1975) (Statement of Thomas Gale Moore). For a contrasting view, *see* Posner, n. 45 *supra* at 9, who suggests that territorial restrictions have, if anything, a greater adverse effect on intrabrand competition than fixing the price at which a distributor may resell a manufacturer's product.

behavior. Again, as in this case of the other potential adverse effects, the likelihood that a vertical restraint will have this power-enhancing or strategic effect on interbrand competition will turn in part on reasonable inferences drawn from interbrand characteristics of that market.

To summarize, it is not sufficient for a party challenging a vertical restraint to show only a resultant loss of intrabrand competition. Rather, current judicial precedent indicates that the party must show that the restraint also has a probable adverse effect on interbrand competition. Of course, as suggested here, that showing will, in many instances, be based upon or inferred from market conditions indicative of limited interbrand competition. We will shortly illustrate in our analysis some interbrand market features that provide a basis for such a determination. If a showing of adverse interbrand effects has been made, then the party defending the restraint may attempt to show some reasonable justification or offsetting benefit that promotes interbrand competition.

As for the other side of the inquiry—whether the restraints promote competition—some commentators argue that little inquiry is required, since all vertical restraints inherently serve to stimulate additional dealer services.[51] To be sure, the *Sylvania* Court suggests that different kinds of vertical restraints simply reflect different ways of achieving the same objective. Yet, the Court also made clear that a rule of reason analysis requires a balancing of the competitive merits and demerits of a particular restraint, a process that implicity requires some consideration of the justifications advanced in support of the restraint.

We believe there are two basic reasons for examining the asserted efficiencies or competitive benefits of a restraint. First, such a review will help to reveal whether the restraint is really serving the manufacturer's interests or, instead, is being imposed at the behest of a dealer cartel. The absence of any strong relationship **[40]** between the practice and the manufacturer's arguable need for the scheme may evince the existence of a dealer-inspired plan to restrict competition.[52] A second reason for examining the proffered justifications is to ascertain their relative significance vis-a-vis any countervailing negative effects of the restraints on interbrand competition.

[51] Posner, The Rule of Reason and The Economic Approach: Relflections on the *Sylvania* Decision, 45 Chi. L. Rev. 1, 17 (1977). Another commentator would permit a defendant to rebut charges of substantial lessening of intrabrand competition by showing a reasonable purpose to enhance distributional efficiency, with a presumption that an economically efficient result would obtain. Bohling, A Simplified Rule of Reason for Vertical Restraints: Integrating Social Goals, Economic Analysis and *Sylvania*, 64 Iowa L. Rev. 461, 513 (1979).

[52] *See Eiberger v. Sony Corp. of America*, 622 F.2d 1068 (2d Cir. 1978), where the court appeared to be concerned about the possibility of cartel influence, although it did not find that the restriction in question was adopted primarily at the behest of dealers.

If the restraints in question are producing adverse interbrand effects, it is especially important to determine the value of the restrictions to the manufacturer's marketing system.

In evaluating the competitive benefits of vertical restraints, we do not suggest that the search should focus on whether a less restrictive method of distribution is available. *Sylvania* clearly does not contemplate such an approach and it undoubtedly would prove elusive in any event. A comparison of alternatives may be useful in particular cases, but the emphasis appropriately belongs on the overall reasonableness of the challenged restraint, not whether some hypothetically less restrictive scheme could be devised.[53]

It is also useful to point out in connection with the issue of competitive justifications, that the *Sylvania* Court did not suggest that intrabrand restraints would be available only to new market entrants or firms introducing new products. As the Court noted, established firms too can benefit from the service-inducing characteristics of vertical restraints. 433 U.S. at 55. Of course, there is far less reason to question the distributional practices of a new entrant, but the competitive virtues of a vertical restraint are not limited to proof that the restraint in question actually reduced concentration or produced other measurable changes in market structure.

Finally, in weighing the potentially diverse effects of a distributional restriction, it should be recognized that the process is not conducive to fine line drawing. Given the limited state of knowledge (especially empirical information) we now have about the actual effects of these practices on competition, it seems desirable to require reasonably clear evidence of probable overall competitive harm before condemning their use in a particular case. With this perspective in mind we turn to the specific facts of this case. [41]

a) Exclusive Dealing and Territorial Restraints

As we discussed previously, Beltone has engaged in practices which, for all intents and purposes, amount to exclusive dealing and exclusive territories. In theory, to the extent that other manufacturers seek to enter the market or expand, and must rely upon the patronage of existing licensed hearing aid dealers, they would be foreclosed from a portion of the market. Entry barriers, accordingly, would be heightened to that extent. However, as the record reveals, the foreclosure in this case affects only about 7 or 8% of the dealers, or about 16% of sales, which actually overstates the exclusivity, since other manufacturers' products have accounted for at least 6 or

[53] *Continental T.V., Inc. v. GTE-Sylvania, Inc.*, 433 U.S. at 58; *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d at 1248-49.

7% of Beltone dealers' sales. Moreover, Beltone's dealership contracts are terminable by either party on 30-days written notice. While the sacrifice made by dealers upon termination is substantial, as we discuss further below, this escape valve dilutes somewhat the limitation on other manufacturers' access to Beltone dealers.

If we were to rely only on static foreclosure effects, the percentages involved might trigger liability under some of the precedents reviewed above. Put differently, if quantitative foreclosure levels are the primary consideration, the amounts involved here are not clearly insignificant, as measured by previous judicial tests. But, following *Sylvania*, a closer look at the dynamics of the affected market is clearly in order. Are barriers to entry effectively raised by the foreclosure? Are competitors effectively inhibited from pursuing other distribution channels? Have rivals been driven from the market or had their costs of reaching potential customers increased as a result of Beltone's practices? In this case, some of the answers to these questions seem quite clear: other firms have recently entered the market or grown vigorously, in part at the expense of the older firms. The new entrants have experienced little difficulty in finding distributors, and their extensive reliance on professional referrals minimizes their dependence on the kind of lead-searching that Beltone dealers rely upon. The trend toward professional referrals shows no sign of abating, thus suggesting that whatever temporary negative effects may arise from Beltone's exclusive dealing are unlikely to persist for long.

Although Beltone is still the leading firm in the market, its share dropped from 21% to 16% over a five-year period from 1972 to 1977. To be sure, Beltone's marketing methods, coupled with restricted customer mobility, may serve to differentiate respondent's products from those of its competitors and confer upon the firm a limited degree of market power. Nevertheless, Beltone's market share is slipping and, as we point out below, its distribution scheme, which ostensibly circumscribes consumer choice, nonetheless seeks to reach previously untapped markets. Under these circumstances, we cannot conclude that the practices in question unreasonably preserve or enhance Beltone's market position. [42]

Moreover, Beltone's exclusive dealing and territorial restraints do not appear to have furthered overt collusion or other forms of interdependent behavior in the market. Interbrand competition appears quite rigorous, with the rank order of the major firms in active flux.[54] At one time, exclusive dealing was arguably practiced

[54] While the four-firm and eight-firm concentration ratios remained nearly constant between 1972 and 1977, the composition of the top group of firms has changed substantially. Oticon, ranked seventh in 1970 with 4% of the

(Continued)

by the major firms in this market, a fact suggesting either that the practice involved efficiencies or that it was collusively adopted to block entry. Complaint counsel claim that the changes that have occurred in the market are largely due to several Commission consent orders, which precluded a number of major industry members from using exclusive dealing.[55] Were that the only explanation for recent market trends, the case would be closer, but the evidence indicates that the rapid entry and growth of new firms in the market have been stimulated by independent factors, including regulations issued by the Food and Drug Administration that encourage the growing practice of professional referrals.[56] In fact, the firms entering the market in recent years appear to be doing so on their own without the necessity for reliance on distributors unleashed by the Commission orders.[57]

As to the hearing aid market's potential for collusion or coordination, available economic literature on the subject suggests several factors that may help to reveal whether a market is susceptible to this problem.[58] These factors [43]include the number of sellers in the market, the degree of concentration, product homogeneity, time required for market entry, demand trends and the ratio of fixed to variable costs, among others. While it is not possible on this record to evaluate fully each of these factors, the evidence does suggest that market conditions in the hearing aid industry are not highly concentrated, but the number of sellers in the market is increasing, not decreasing. Moreover, the products and terms of sale offered are quite heterogeneous.[59] Also, entry is not especially difficult, a factor that reduces the potential rewards of inter-firm coordination. Although demand is finite, limited by the number of hearing impaired persons in the country, the market has not yet been fully tapped, as evidenced by the growth of new firms and the substantial number of hearing-impaired individuals without hearing aids. The market does not appear to be characterized by stagnant or falling demand that may make collusion—either express or tacit—more profitable. Nor is the industry characterized by high fixed costs, a

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market, rose to third with 10% in 1977; Starkey, which entered the market in 1972, was second with 13% in 1977; the shares of Dahlberg, Audiotone and Qualitone have remained relatively constant since 1970; sales by Maico and Zenetron have declined; and Nu-Ear and Siemens have grown significantly. (ORF 3, 4)

[55] *Sonotone Corp.*, 82 F.T.C. 1802 (1973); *Radioear Corp.*, 82 F.T.C. 1830 (1973); *Dahlberg Electronics, Inc.*, 84 F.T.C. 222 (1974); *Maico Hearing Instruments, Inc.*, 88 F.T.C. 214 (1976).

[56] 42 Fed. Reg. 9295 (1978); ORF 12.

[57] OR 6, 7, 8, 9; RRB 30.

[58] *See, e.g.*, R. Posner, Antitrust Law: An Economic Perspective 55-61 (1976); Hay and Kelley, An Empirical Survey of Price Fixing Conspiracies, 17 Journal of Law and Economics 14-17 (1974).

[59] Collusion is most likely when the costs, market shares, buyers, capacity, products, sales terms and business objectives of the industry members are identical, or at least very similar. The evidence here reveals a fair degree of diversity among hearing aid manufacturers and dealers on many of these points. (OR 5-13)

condition that may enhance the incentive to collude, especially when demand is down and there is over-capacity. Finally, there is some demand inelasticity in the market, another indicium of a market's potential for collaboration. Simply put, there are no good substitutes for hearing aids and customers are not highly price sensitive. However, the peculiarities of this market suggest that the emphasis on non-price competition is less a sign of competitive weakness than it is a response to the special needs of buyers.

By this analysis, we do not suggest that review of a market's susceptibility to collusion will be dispositive, or even necessary, in all vertical restraint cases. As reflected in the literature on the subject, there is much still to be learned about this issue, and the predictability of any given factor is by no means well established. Nevertheless, this kind of analysis can serve to supplement consideration of market share data and other structural trends, as we have done here. For the hearing aid market, our examination indicates that interbrand competition is quite active and that complaint counsel have failed to prove that Beltone's restraints have significantly impaired competition at that level. Complaint counsel, in fact, have not really suggested that Beltone's restraints facilitate interbrand coordination; rather their theory is that the restraints enhance Beltone's market power and substantially restrict [44]consumer choice at the interbrand level. Complaint counsel also claim that the territorial and customer restrictions are imposed primarily as a form of compensation for having to limit their product line to Beltone hearing aids. As we have discussed previously, the evidence on market power reveals that the restrictions have not prevented Beltone's market share and profits from being eroded substantially in recent years.

In this complex service-oriented market, it is not very enlightening merely to compare Beltone's average wholesale or retail prices to average prices of other manufacturers or dealers, since much of the competition takes non-price forms. Of course, if such a comparison showed that Beltone were able to command inordinately higher prices with no apparent justification, we would look further into Beltone's probable market power, but the record before us is insufficient to support such an inference. Beltone's market postion has steadily declined in the late 1970s and seems likely to continue doing so. Beltone's restraints do not seem to confer upon it any significant market power, and respondent has shown no ability or inclination to use its restraints strategically to injure its rivals, as far as this record reveals.

Finally, there is no evidence that Beltone's restraints have

facilitated cartel conduct at the dealer level, or that these restraints have been imposed primarily for the benefit of the dealers as complaint counsel contend. As we discuss in connection with the justifications for the restraints, Beltone's marketing plan is reasonably related to its stated interbrand competitive objectives. It appears to have been unilaterally designed and does not amount to a pretext for dealer collusion or cartelization.[60]

Turning next to the intrabrand effects, Beltone's territorial and customer restrictions certainly, in theory, inhibit intrabrand competition. Although the restrictions have not been completely airtight, they largely eliminate opportunities for price and non-price competition among Beltone dealers in a market characterized by customer immobility and limited price shopping. Absent territorial restrictions, it is argued, non-price intrabrand competition (*e.g.* more convenient hearing aid adjustments) might increase. Several dealers testified that, if permitted, they would have established additional service locations in adjacent territories. Further, some manufacturers [45]expressed the view that more service locations would benefit hearing aid users suffering from restricted mobility, if the new locations provided more convenient access.[61] Apart from this limited evidence on non-price competition, complaint counsel have not shown in this record whether this peculiar market lends itself to, or would have experienced, any significant degree of price competition. Some of the evidence indicates that hearing aid users do shop around for prices,[62] while other evidence suggests that there is little shopping of any kind. After weighing this evidence, the ALJ concluded that there is little likelihood of significant price shopping at the retail level in this market. (ID 77, OR 22) We think the

[60] *Compare Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 168 (3d Cir. 1979), in which it was noted that if a manufacturer imposes a restraint or terminates a dealer at the request of another dealer, then the restraint becomes primarily horizontal in that the dealer is seeking to suppress competition at its level with the aid of a cooperating common supplier. *See also United States v. General Motors Corp.*, 384 U.S. 127 (1966). Likewise, the court in *Eiberger v. Sony Corp. of America*, 622 F.2d 1068, 1077 n. 12 (2d Cir. 1980) expressed keen interest in, although it did not review, the evidence supporting the lower court's finding of a conspiracy among dealers to divide territories and eliminate price competition.

[61] For example, the president of Danavox noted that having more than one dealer in an area "affords the impaired individual a choice" of sources of assistance. (Tr. 19231) The president of Zenetron also testified that the accessibility afforded by multiple dealers is important to an aged population with reduced mobility, who are likely to seek service from the nearest dealer rather than the one who sold the instrument. (Tr. 18973; *see also* Tr. 19093) A related interbrand feature of multiple dealerships was described by officials of Danavox and Maico, who believe that they maximize their chances of winning professional referrals by having more than one dealer in an area and thereby providing customers with better opportunities for proper post-sale service. (Tr. 19231; Tr. 299-300)

[62] Three manufacturing witnesses expressed, albeit cursorily, the view that there is price competition among dealers at the retail level and that hearing aid customers shop for the best prices. Mr. Dahlberg, president of Dahlberg Electronics, said that he "knows for a fact" there is "a lot of price-shopping," and thinks there has been for 35 years. (Tr. 18699) Mr. James Keyes, president of Audiotone division of Lear Siegler, was "sure" there is price-shopping by hearing aid customers, and price competition among dealers, "to some degree." (Tr. 19131-32) And Mr. Helmut Ermann, president of Siemens Hearing Instruments, Inc., said more obliquely that one benefit of having multiple Siemens dealers in a town (*i.e.*, no territorial restriction) is that the customer can shop for a hearing aid. (Tr. 19158)

evidence demonstrates some lessening of intrabrand competition, although in terms of price competition perhaps not to the degree that occurs in other markets. All vertical restraints, of course, by their very nature occasion some reduction in intrabrand competition, so that the extent of the restriction is significant primarily in terms of its interbrand effects, including any positive effects, an issue which we will now take up. [46]

As previously described, Beltone defends its distribution practices on the grounds that they stimulate more intensive search efforts by dealers in a market where potential customers are difficult to locate and less susceptible to traditional marketing techniques. In the absence of success with professional referrals, respondent claims that it must preserve its case-finding system—which relies upon both national lead advertising and dealer advertising supported by cooperative ad allowances—to assure that dealers supply the information and educational services necessary to attract prospective purchasers. To abolish this system, respondent contends, would dilute the effectiveness of its lead advertising programs and encourage non-service-oriented dealers to free ride on the substantial investment of those dealers who undertake the costly and painstaking process of identifying and following up leads.

Complaint counsel, on the other hand, argue that preservation of the lead system does not justify such severe restrictions on competition and consumer choice. They contend that Beltone has not shown that free riding exists, and they assert that other firms engage in lead-generating activities without resort to similar restraints. Complaint counsel also question the interbrand benefits of Beltone's system, citing the increasing disfavor of lead advertising throughout the rest of the industry. In addition, complaint counsel suggest that dealers have sufficient incentives to engage in adequate search efforts even if Beltone did no national lead advertising. And, complaint counsel claim, given the limited mobility of many elderly hearing aid customers, exclusive dealing prevents those customers from being fitted with the product best suited to their needs.

In evaluating these arguments, we recognize that the industry trend is away from the lead advertising technique, but that trend, by itself, is not cause for prohibiting the restraints in question. We are not interested so much in whether Beltone's practices ultimately help it to prevail in the marketplace; rather, our concern here is whether the restrictions reasonably serve Beltone's market objectives. A comparison of industry practices can help to facilitiate the

analysis. For example, at least one firm dropped its national lead advertising program after entry of a Commission consent order.[63] Two manufacturers no longer rely on leads (OR 10, 11), and other companies which continue to use some lead [47]advertising have less elaborate systems than respondent. Complaint counsel claim that this latter evidence shows that lead advertising can exist without the restraints employed by Beltone, but the evidence cited by complaint counsel reveals only that certain manufacturers make advertising available to their dealers for a fee. (CAB 51; Tr. 18650, 18914, 19120, 19318, 19418)

It can be argued, of course, that the reason for the industry shift is because alternative methods of finding leads and alternative marketing systems, e.g., professional referrals, are more efficient and competitively superior. But the record shows that there are a number of reasons for the shift in marketing methods. As we have previously pointed out, there is little doubt that FDA regulations promoting professional referrals, together with entry by foreign firms, have had a significant influence on competitive behavior in the hearing aid industry. It can also be fairly said that consent orders prohibiting some firms from using the kind of lead system employed by Beltone may have contributed in part to a shift away from this kind of marketing device. Thus, while the evidence on industry trends is by no means conclusive, it certainly does not prove that Beltone's methods are valueless or its justifications are without merit.

Apart from the industry trend, complaint counsel claim that there really is not a free rider problem in the hearing aid market, since there is little comparative shopping, especially on the basis of price. Although price shopping may not be as important in this market as elsewhere, that does not vitiate Beltone's free-rider justification. Respondent not only engages in lead advertising on a national level but also provides substantial cooperative advertising assistance to dealers who promote the Beltone name. As we know, given the peculiarities of this market, including the reluctance of potential hearing aid users to seek out assistance, substantial pre-sale activity is required to penetrate the market effectively. Beltone dealers not providing these pre-sale services might attempt to free ride on those

[63] Dahlberg, a major hearing aid manufacturer, used national lead advertising prior to its consent agreement but abandoned the program thereafter because it allegedly became too difficult to assign leads without territorial exclusivity. Mr. Dahlberg testified that a lead system cannot work on a national scale without the use of areas of primary dealer responsibility. He attributed the market losses experienced by his company after the consent order directly to cessation of his national lead program. He claimed that his company's costs of obtaning leads and identifying hearing-impaired persons were lower, using national advertising, than they were after the consent. (Tr. 18701-02)

who do promote respondent's tradename and expend the effort to locate prospective purchasers.

In addition, because of the potential for overlap or duplication of effort, removal of these restraints may reduce or distort the promotional activities of individual dealers. This effect, while related to the free rider issue, more directly concerns the efficient utilization of each dealer's advertising effort. Greater intrabrand competition reduces the probability of turning any given leads into a sale; the ultimate consequence could be a decreased incentive for dealers to expend time and money to service leads, resulting in a diminution in the overall level of pre-sale promotion and a likely tendency toward "cream-skimming," *i.e.,* pursuing only the most promising leads and leaving other segments of the market unserved. Even under the present system, where incentives are high, only about 5% of leads result in consummated sales. [48]

Complaint counsel further contend that Beltone could continue its national lead-advertising system simply by allocating leads to pre-selected dealers and requiring that only Beltone products be sold to those leads. However, even if this approach were feasible for Beltone-generated leads—and another manufacturer's experience provides evidence to the contrary[64]—it would be more difficult for respondent to monitor the sale of non-Beltone products to leads generated by dealers. Thus, to the extent that respondent seeks to protect its investment in lead-promoting activity, at both the national and dealer levels, the restrictions in question have a rational and efficient connection to that objective.

It is also argued that much advertising by dealers is oriented to local service, not brand promotion, and that dealers have adequate incentives to serve all segments of their markets. It is no doubt true that dealer service is an important form of non-price competition and that dealers obviously have some incentives to penetrate their markets. Nevertheless, dealer promotion, if left unchecked, does not necessarily coincide with the interests of individual manufacturers. What is at stake for the manufacturer is to insure that its chosen distributors make the maximum marketing effort on behalf of its particular products. This is not a market where products are homogenous and easily accessible to buyers, with brand recognition and price the principal selling points. Here, the product being sold is a more complicated combination of hardware and service, with considerable education and selling effort required to persuade perspective customers of their need for a hearing aid. Under these

[64] n. 63 *supra.*

circumstances, there is more justification for manufacturers to seek ways of motivating dealers both to seek out potential customers and to emphasize the unique characteristics and advantages of their products.

We recognize, of course, that there are welfare tradeoffs, as complaint counsel contend, if Beltone dealers are limited to selling Beltone products. As the evidence reveals, there are situations where another manufacturer's product may better serve a customer's needs. While exclusive dealing has this arguably adverse effect on consumer welfare, it must be weighed against the potential benefits of Beltone's distribution system in reaching consumers not previously served by other marketing methods.[65] [49]Thus, with respect to Beltone's exclusive dealing, we are faced with a restriction that simultaneously may produce conflicting effects on consumer welfare. Given these potentially counterbalancing but unquantifiable welfare effects, we would be reluctant, other things being equal, to condemn the practice of exclusive dealing. That conclusion is strengthened by the fact that the restraints under scrutiny here have produced no demonstrable adverse effects on interbrand competition.

In short, respondent's practices appear to serve legitimate efficiency or procompetitive purposes. It is possible that less restrictive alternatives could be devised, but as *Sylvania* and other cases suggest, that kind of inquiry is certainly not required as a matter of course in all, or even most, cases. If the restraints in question here harmed interbrand competition, we might appropriately ask whether less restrictive alternatives were feasibly available. But, in the absence of such evidence of interbrand effects, we cannot find that Beltone's distribution practices are unjustified. Nor are we persuaded by arguments that the territorial and customer restrictions simply represent a form of compensation to dealers for their agreement to carry only the Beltone brand. There is evidence indicating that some dealers were especially desirous of maintaining territorial protection (ID 45), but that is not a sufficient reason, by itself, to condemn the practice. Whatever the motivations of particular dealers, the record shows that Beltone viewed the restraints as part of an overall system designed to promote its competitive objectives. This not a situation like the one described in *Cernuto,* n. 60 *supra,* where the manufacturer, in terminating a dealer, appeared to be acting at the sole behest of a competing dealer.

To sum up, we would not find Beltone's foreclosure of 16% of

[65] The ALJ found that Beltone dealers did not serve any demographic group not reached by other marketers. (ORF 21) That fact, even if true, does not undercut the argument that Beltone's distribution system may have reached customers in such groups more effectively than other systems.

market sales or 7 to 8% of dealers clearly lawful if judged solely by the quantitative benchmarks found in prior precedent. Certainly, the percentage of foreclosure here is greater than that in *SOCAL* and *Tampa Electric,* comparable to that in *American Motor Inns, Cornwall Quality Tools* and *Mytinger & Casselberry,* but less than that in *Dictagraph* and *Luria Bros.* In assessing the overall effect of this foreclosure in light of the dynamics of the market, however, we find that interbrand competition is vigorous, that new entry and destabilizing growth have occurred, that no firm has encountered noticeable barriers to entry because of respondent's exclusive dealing and that the market trend toward professional referral is clearly unfavorable to Beltone's competitive position. Moreover, complaint counsel have failed to prove that the restraints have facilitated interdependent behavior or enhanced respondent's market power. In fact, Beltone in recent years has been steadily losing market share. [50]

Complaint counsel have asserted that Beltone's restraints should be ruled unlawful even absent any adverse effect on interbrand competition because the restraints eliminate significant intrabrand competition. As discussed previously, we believe that a successful challenge to any vertical restraint requires a showing of an adverse effect on interbrand competition. Furthermore, we find from this record that the territorial restrictions have had only a problematical effect of intrabrand price and non-price competition while contributing in identifiable ways to the achievement of respondent's interbrand competitive objectives. We therefore find that the challenged practices have not unreasonably restrained competition, and we dismiss the complaint as to these issues.

Other Issues

A few final issues remain to be considered. There are two aspects of Beltone's restraints that are not discussed in the appeal from remand, but remain from the initial argument, which we shall describe as the issues of "post-termination restraints" and the "customer lists." First, the complaint charged respondent with imposing certain post-termination restraints, including prohibitions on the dealer's use of the Beltone trademark and, in some cases, his inventory of Beltone products. More importantly, the complaint charged that upon termination, dealers were required to return to Beltone the names of their Beltone customers. These restraints were alleged to be in furtherance of Beltone's overall course of exclusive dealing and territorial exclusivity, themselves either unfair methods of competition or unfair acts or practices. Also, the ALJ found that, at least prior to 1973, Beltone used for its own purposes the names of

its dealers' customers (submitted to Beltone on guarantee registration cards), without the knowledge either of the dealers or the customers. While the law judge drew no specific conclusions with respect to the post-termination restraints, he found the practices involving customer names to be unfair acts or practices within the meaning of Section 5 of the FTC Act. (ID 72–77)

Conduct that is alleged to constitute an unfair act or practice under Section 5 of the FTC Act must meet the criteria of unfairness set forth in the Commission's recent Policy Statement on the subject.[66] In that Statement, the Commission delineated two fundamental inquiries for determining whether a business practice is unfair: 1) whether the practice causes unjustified consumer injury and 2) the extent to which other public policies—be they legislative or judicial—impact upon the practice. On the issue of consumer injury, the Commission emphasized that to justify a finding of unfairness, the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefit to consumers or competition yielded by the practice; and it must be an injury that consumers themselves could not have reasonably avoided. [51]

Turning first to the post-termination practices, we believe that from an antitrust perspective they must be recognized as being adjunct to Beltone's whole system of vertical restraints, which we have concluded are not unlawful. While these contractual requirements may reinforce the threat of termination, they do not, by themselves, amount to unfair methods of competition under the circumstances of this case. Instead, we find them to be normal incidents of business dealings between a supplier and its distributors, not unrelated to Beltone's lawful right to terminate dealers for cause and to protect its legitimate business interests thereafter. Nor do we find support in the record for complaint counsel's contention, set forth in the appeal prior to remand, that these requirements constitute unfair acts or practices. (COAB 42) Indeed, there is no need for any extensive analysis of the criteria of unfairness described above inasmuch as we find nothing in the record to which they can be applied.

As for customer lists, the ALJ found that a) Beltone's requirement that terminated dealers submit the names and addresses of their customers to Beltone and b) Beltone's use of said lists either to give to succeeding dealers or to rent to companies outside the hearing aid industry were misappropriations of property constituting unfair acts

[66] Commission Statement on the Commission's Consumer Unfairness Jurisdiction, December 17, 1980. See *Horizon Corp.*, 97 F.T.C. 464 (1981).

or practices. (ID 83) The ALJ's theory of unfairness to consumers from the rental of their names derives from his view of the confidential relationship between hearing aid users and dealers, which he compared to the physician-patient relationship. On this premise, he applied the Commission's holding in *Beneficial Corp., et al.,* 86 F.T.C. 119 (1975), *aff'd sub nom. Beneficial Corp. v. Federal Trade Commission,* 542 F.2d 611 (3d Cir. 1976), in which a loan company's solicitation of confidential individual tax information through its tax-preparation arm and its subsequent disclosure of the information to its loan arm without taxpayers' consent was found to be unfair and deceptive. The unfairness found in *Beneficial* was based on a) a breach of the widely recognized and manifested concern for the confidentiality of individual tax information and b) an intentional breach of a fiduciary relationship. Again applying the criteria of unfairness enunciated in the aforementioned Policy Statement, we look at whether the practice causes unjustified consumer injury and how public policies impact upon practice. On this basis, we find *Beneficial* distinguishable and the record lacking. While the relationship between hearing aid users and dealers might bear some of the earmarks of the patient-physician relationship, whatever public policy exists favoring preservation of confidentiality in the user-dealer relationship, it does not nearly approximate the broad policy and statutory mandate that provided the basis for the *Beneficial* decision.[67] Indeed, there is nothing in this record that provides a basis for a finding like that in *Beneficial.* Moreover, any inference of consumer injury—based, for instance, on consumer expectations—is simply **[52]**too speculative to support a finding of unfairness. While we do not necessarily endorse the practice of rental of hearing aid customer names (a practice that ceased in 1973), there is insufficient information in this record upon which to find substantial injury resulting from it.

As for the charge of misappropriating dealers' customer names upon termination, the focus here is upon injury to the dealers. As noted, we have evaluated this requirement as an element of the overall system of restraints, and we have found that Beltone has, at least in part, compensated its dealers for these names through cooperative advertising assistance. It has not been argued, nor did the ALJ conclude, that this practice standing alone has an unreasonable effect on either intrabrand or interbrand competition. Instead, like the other post-termination practices, it only contributes to the

[67] There is also another distinction between *Benefical* and this case. In *Beneficial,* the loan division of respondent had access to all of the financial information contained in individual tax returns. 86 F.T.C. at 169 Here, the only information transmitted was the customer's name.

aura of coercion surrounding the threat of termination. There is no evidence of conspiracy or collusion between Beltone and replacement dealers, as complaint counsel originally contended. (COAB 43) We therefore find the case of *Peerless Dental Supply Co. v. Weber Dental Manufacturing Co.*, 299 F.Supp. 331 (E.D. Pa. 1969), relied upon by the ALJ, inapposite. Further, while there are cases, decided under various state laws dealing with tortious interference with business relations, which confer confidential and protected status upon both manufacturers' and dealers' customer lists under certain circumstances,[68] we do not find support in this record for an independent finding of an unfair method of competition grounded in such principles.

Likewise, applying the previously described consumer unfairness criteria to the misappropriation charge, we cannot say that there is sufficient evidence of substantial injury. Since 1971, Beltone dealers have agreed to this condition as part of their contractual relation with the manufacturer. In this sense, dealers could reasonably avoid injury by refusing to associate with Beltone, [53]although there are costs to existing dealers in ending the relationship. Prior to 1971, there might have been potential for dealer misunderstanding concerning the transfer of customer lists to Beltone upon the dealer's termination. But the record before us is simply inadequate to make a sound determination of the magnitude of consumer (*i.e.*, dealer) injury associated with this practice. Moreover, as we pointed out before, Beltone has an investment in customer names by virtue of its cooperative advertising allowance and other assistance to dealers. Thus, we find a failure of proof that the required relinquishment of customer names upon termination constitutes an unfair act or practice.

Therefore, for all of the reasons expressed herein, we reverse the decision of the administrative law judge and dismiss the complaint.

CONCURRING STATEMENT OF COMMISSIONER BAILEY

The Commission states in this Opinion that even a reasonably "airtight" system of intrabrand non-price distributional restraints is

[68] In *Auburn News Co., Inc. v. Providence Journal Co.*, 504 F.Supp. 292, 304 D.R.I. (1980), *rev'd on other grounds*, 659 F.2d 273 (1st Cir. 1981), distributors successfully enjoined a publisher from using their customer lists. The court recognized that in some circumstances customer lists were confidential and protected from misappropriation. It was significant in that case, however, that the publisher recognized the distributors' proprietary interest in the customer lists. *See also General Business Services, Inc. v. Rouse*, 495 F.Supp. 526 (E.D. Pa. 1980) (former supplier enjoined from using customer lists that were found to be misappropriated trade secrets); *Republic Systems and Programming, Inc. v. Computer Assistance, Inc.*, 322 F.Supp. 619 (D. Conn. 1970) (employer's customer names did not constitute trade secrets to be protected from use by competing former employees).

lawful unless anticompetitive effects of that system are reflected at the interbrand market level[1]. Once we have concluded that this record reveals and essentially competitive interbrand market for hearing aids, not adversely affected by Beltone's system of intrabrand restraints, our concern with those restraints is at an end. In my view, the Commission's additional analysis of Beltone's "justifications" for its system of intrabrand restraints was unnecessary. Any manufacturer can produce an explanation that "justifies" a particular system of distribution, whether those explanations are cast in terms of "efficiencies," "reasonableness" or "procompetitiveness." The apparent purpose for conducting such an analysis was to show the kinds of additional considerations the Commission would examine in some future case where the interbrand competitive picture is of greater concern than it is here.

At the intrabrand level in this case, respondent has established a system of Beltone-only dealers by granting these dealers exclusive territories in which to develop and serve Beltone-cultivated customers whose loyalties to Beltone, once developed, are likely to continue through repeat business for the life of the consumer. Thus, a practical system of exclusive dealing is secured and maintained by the *quid pro quo* of valuable local distributor territorial and customer monopolies.

At the interbrand level, there are approximately 5000 distributors of hearing aids, only 7-8% of which sell Beltone products. Beltone's market share in 1977 was around 16%, down from 21% in 1972. Four-firm and eight-firm concentration has remained at 50% and 70%, respectively, during the relevant period. Beltone has been the leading firm throughout, although the other market leaders have changed place over time. About 35% of the market is now held by foreign firms that were not a major market factor a few years ago. Barriers to the entry of new competition in this industry are low. In addition, in 1977, FDA regulations began requiring hearing aid dealers to inform potential customers of the advisability of seeking a professional hearing test. The result is that professional referrals now account for about 40% of all hearing aid sales, though only about 10% of Beltone's business, which is developed through pre-sale Beltone and Beltone dealer advertising and "case generation" efforts. [2]

If the record showed no more than this, I would feel easier with the conclusion that this case be dismissed. As the Commission has found,

[1] The Commission appears to accept the formulation of legal theory offered by respondent and accepted by the ALJ: "The principal question for decision on remand is whether the alleged territorial or customer restrictions have any effect upon interbrand competition in the hearing aid industry." (RAB, 26).

16% is not itself a decisive degree of market foreclosure (or more to the point, market power) sufficient on which to base a finding of liability in light of other market conditions. But this matter is difficult to separate from its historical law enforcement context. The Beltone case is the result of respondent's refusal to submit to a consent order signed by four of its then-major competitors, barring exclusive distributorships in this industry. Between 1973 and 1976, Sonotone, Radioear, Dahlberg and Maico settled Commission complaints against their exclusive distributorships, opening up these distribution systems to the hearing aids of competing manufacturers. Complaint counsel argue—but cannot quantify—that the current "competitive" picture of the interbrand market has resulted from the effects of those consent orders. (CAB, 36–37). There is testimony, for instance, from Oticon, Audiotone, and Starkey that distribution of their products was easier after entry of the Commission consent orders.[2] While the Administrative Law Judge concluded that barriers to the entry of new competition in this market were low, complaint counsel argues that this is only so because of the presumption that existing dealer networks, other than Beltone's, remain open to the distribution of competing hearing aid products (OR, 15; CCAB, 37 n. 34).

The record in this case is also imperfect in demonstrating the interbrand price effects of Beltone's restraints. Complaint counsel argue that there is very little interbrand competition in this market because consumers do not comparison shop and are not sensitive to price differences. Hearing aid prices are not set in consideration of the prices charged others, and Beltone's higher prices are insulated from any competition by its distributional restraints system. The Administrative Law Judge found on remand that Beltone's wholesale prices were higher than those of *some* competing products, (ORF 19 at 18), which could be a competitively suspect result attributable to the protection from competition from competing brands (OR, 25). The ALJ also agreed that Beltone prices were set without consideration for the prices of competitive manufacturers. But the actual evidence on hearing aid prices and details of comparative product pricing generally, is practically nil. There is also no evidence on what portion of Beltone's prices is attributable to the costs associated with the customer-finding and service operations Beltone's distributorship system provides. [3]

Finally, complaint counsel ascribe the decline of Beltone's market position to an overall decline in demand due to inflationary

[2] Oticon distribution was through Dahlberg dealers, and Audiotone has distributed through Maico and Sonotone dealers (CCAB, 37).

pressures in the 1970s on fixed incomes, on Beltone's "late start" in exploiting professional referral sales, and on Beltone's financial commitment to research and development (rather than sales) efforts.

I am left thus with an objective picture of a relatively competitive interbrand hearing aid market, but with the feeling that these competitive conditions may be explained by conditions at work in spite of Beltone's distributional restraints. The elimination of Beltone's restraints would, under this view, facilitate even greater competition. Whatever the truth of the matter, complaint counsel has failed to carry its burden to show an adverse impact on interbrand competition in this case.

While the Supreme Court made it clear that the assessment of non-price vertical restraints primarily should focus on the interbrand competitive level, it did not address in detail the permissible ambit of intrabrand restraints that might inhibit competition between and among a manufacturers' distributors, except to prescribe a Rule of Reason analysis. In the absence of clear instructions on remand of this proceeding,[3] I read complaint counsel as attempting to construct an argument that there was an inhibition on intrabrand competition that could only withstand a vesting of liability if respondent carried a burden of proof in showing offsetting procompetitive interbrand effects of the alleged intrabrand restraint.[4] (In this regard, it is of course complaint counsel's view that Beltone's system of intrabrand restraints protects Beltone from price competition by other hearing aid manufacturers, and that there is very little interbrand price competition in the interbrand market).

The Commission finds, and I agree, that by and large complaint counsel have demonstrated (over vigorous Beltone opposition) that Beltone's system of intrabrand restraints amounts to a form of exclusive dealing through exclusive territories and exclusive access to customers cultivated within those territories. It is [4]conceded by the Commission—and even by respondents (RAB, 43)—that Beltone's restraints inhibit at least some intrabrand competition. But the Commission finds that these restraints are justified—and thus lawful—because they serve legitimate Beltone competitive purposes. That is, the restraints seem justified by the success of Beltone in making out an "efficiencies defense" that explains the restraints in terms of their influence on Beltone's interbrand competitive position. There are inherent dangers in carrying the analysis to this point. The Commission's concern that Beltone's restraints "reason-

[3] 91 F.T.C. 884 (1978).

[4] "A practice is absolutely impermissible under the Rule of Reason if adverse intrabrand effects result and there are not conterbalancing, procompetitive interbrand effects to outweigh, offset or 'check' the adverse effects." (CAB, 27)

ably serve Beltone's market objectives" is the Achilles heel of this decision. Applying a Rule of Reason test in this fashion in order to weigh Beltone's justifications for its system of distributional restraints puts too much faith in Beltone's assertions and leads, I fear, inevitably to a real possibility that complaint counsel will always lose—even if it can get past the interbrand effects hurdle.

In my view what the Commission is actually saying in this case is that complaint counsel simply saddled the wrong horse by basing its legal theory of violation on intrabrand competition and failing to carry a burden of proof to show adverse interbrand competitive effects stemming from intrabrand restraints. Thus, I would have made it clearer that where no adverse interbrand competitive effects are demonstrated, the Commission does not expect the parties also to focus on an agonizing and protracted additional consideration of the specific justifications for a system of intrabrand restraints.

Because the Commission's analysis went beyond the simple assessment of competitive effect at the interbrand level, its Opinion might be read to sanitize a system of airtight intrabrand restraints in all interbrand competitive situations as long as some sort of highly predictable free rider danger or other excuse is thrown up to justify the restrictions. I do not believe this record shows that a system of airtight restraints was reasonably necessary to achieve Beltone's competitive goals. Beltone's lead generation system was not unique to Beltone, and the record shows no practical free rider threat, whether real or theoretical. I believe an analysis of such airtight restraints should await the day when it is necessary to a determination of liability. Then, the burden would be on the respondent to show that the specific pro-competitive consequences of its system of "airtight" restraints outweighed the demonstrated anticompetitive interbrand effects. However, in considering respondent's arguments, the Commission's analysis should be extremely skeptical of makeweight justifications and post-litigation afterthoughts. All that this case should stand for, in my view, is that complaint counsel has failed to carry its burden of proof when it fails to show a negative competitive interbrand effect from Beltone's system of intrabrand non-price vertical restraints.

Final Order

This matter has been heard by the Commission upon the appeal of respondent from the initial decision and order certifying the record on remand and upon the briefs and oral arguments in support of and in opposition to the appeal. For the reasons stated in the accompany-

ing Opinion, the Commission has determined to reverse the initial decision. Respondent's appeal is granted. Accordingly,

It is ordered, That the complaint is dismissed.

It is also ordered, That all motions pending in this matter and not resolved in the accompanying Opinion, with the exception of various [2]motions for extended *in camera* treatment of data which are responded to in a separate Order, are hereby denied.[1]

[1] On October 15, 1981, after the oral argument on the appeal from remand, respondent filed a motion seeking a) to supplement the record with a consultant's report on the hearing aid industry, b) to have referred to an administrative law judge a question regarding discovery of the aforementioned consultant's report and c) to reargue the appeal. Complaint counsel filed timely responses to each portion of respondent's motion. The Commission has considered each of the motions and, finding that respondent has not been prejudiced by any matter raised by those motions and that the questions raised therein are mooted by this Opinion and Order, denies the motions.

IN THE MATTER OF

BAYER AG, ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C–3007. Final Order, Jan. 15, 1980—Modifying Order, July 6, 1982

This order reopens the proceeding and modifies the Commission's order issued on January 15, 1980, 95 F.T.C. 254, by deleting Paragraphs I-IV from the order, so as to relieve respondent of the requirement of divesting assets used to manufacture allergenic extracts. Accordingly, the portion of Paragraph VII concerning respondent's divestiture efforts has also been deleted.

REOPENING AND MODIFICATION OF ORDER DOCKET NO. C–3007

By petition filed on February 26, 1982, respondent Miles Laboratories, Inc. ("Miles"), requests on behalf of itself, Bayer AG, and Rhinechem Corporation that the Commission's order in Docket No. C–3007 be modified so that Miles no longer would be required to divest assets used to manufacture allergenic extracts. Pursuant to Section 2.51 of the Commission's Rules of Practice the petition was placed on the public record and Mr. Stanford Yates, representing Kallestad Laboratories, Inc., and Dr. Raymond Rosedale filed comments.

Miles previously had petitioned the Commission to modify the order. However, the Commission by a letter dated May 22, 1981 denied the earlier petition but granted a year's extension of the time in which Miles was required to divest its allergenic extracts assets.

Upon consideration of Miles' petition and supporting material and the public comments, the Commission now finds that due to a Food and Drug Administration proposal to eliminate Category III(A) as a classification for biologics, Miles is unable to sell its allergenic extracts business as a complete, viable competitor. In denying Miles' previous petition, the Commission noted that the proposed elimination of Category III(A) might constitute a changed circumstance sufficient to warrant modification of the order. Events since then have established that modification is now warranted. For this reason the Commission has determined that the order should be modified.

Accordingly,

It is ordered, That the proceeding be, and it hereby is, reopened.

It is furthered ordered, That the order to cease and desist be, and it hereby is, modified by deleting Paragraphs I–IV of the order and so

much of Paragraph VII as relates to reports of Miles' divestiture efforts. Paragraph VII will now read:

It is further ordered, That respondents shall annually, on the anniversary date of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which each or every respondent intends to comply, is complying or has complied with the order.

IN THE MATTER OF

AMERICAN MOTORS CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3093. Complaint, July 6, 1982—Decision, July 6, 1982

This consent order requires a Southfield, Mich. motor vehicle manufacturer and its subsidiary to cease, among other things, failing to disclose that the Jeep CJs handle and maneuver differently from ordinary passenger cars under certain reasonably expected driving conditions; and that sharp turns or abrupt maneuvers on pavement may result in loss of control or an accident. The order requires the company to place a prescribed sticker on the windshield of all new Jeep CJs warning owners of the Jeep's handling and maneuvering limitations; provide all existing Jeep CJ owner's manuals with an informational supplement concerning on-pavement driving and update the owner's manual to include this supplemental information. The company is also required to provide its dealers with a point-of-sale display designed to call attention to the Supplement, and with a sufficient quantity of the Supplement to enable dealers to make it available to each person who requests it. The order further requires the company to send to current registered owners of Jeep CJs since 1972, the sticker and the Supplement, together with a letter advising the owner to affix the sticker to his/her Jeep.

Appearances

For the Commission: *Barry E. Barnes, Rachel W. Sesser* and *Paula K. Stein.*

For the respondents: *John M. Sheridan* and *Kenneth I. Gluckman,* in-house counsel, Southfield, Mich., *Earl W. Kintner, Robert H. Neuman* and *Christopher Smith, Arent, Fox, Kintner, Plotkin & Kahn,* Washington, D.C. and *Robert N. Sayler* and *Robert M. Sussman, Covington & Burling,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that American Motors Corporation and Jeep Corporation, corporations (hereinafter "respondents"), have violated Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Allegations in this complaint in the present tense include the past tense. For purposes of this complaint the following definitions shall apply:

(1) *Jeep CJ(s)* means CJ5, CJ6 or CJ7 model Jeep motor vehicles manufactured by Jeep Corporation.

(2) *Ordinary passenger car* means a vehicle designed primarily for non-commercial on-pavement usage and excludes utility vehicles, vans, buses or trucks.

(3) *Advertisement* means any written, verbal or audiovisual statement, illustration, depiction or presentation, which is designed to effect the sale or lease of any Jeep CJ, or to create interest in the purchasing or leasing of such vehicles whether such statement, illustration, depiction or representation appears in a brochure, newspaper, magazine, leaflet, circular, mailer, book insert, catalog, billboard, public transit card, point-of-sale or lease materials, film strip, video presentation, or in a radio or television broadcast or in any other media, regardless of whether such statement, illustration, depiction or presentation is characterized as promotional, educational or informative.

PAR. 2. Respondent American Motors Corporation (hereinafter "AMC") is a Maryland corporation with its principal place of business at 27777 Franklin Road, Southfield, Michigan.

Respondent Jeep Corporation (hereinafter "Jeep") is a Nevada corporation with its principal place of business at 27777 Franklin Road, Southfield, Michigan.

AMC dominates and controls the acts and practices of its wholly owned subsidiary Jeep.

PAR. 3. AMC's net sales for the fiscal year ending September 30, 1979 were in excess of $3.1 billion. Jeep CJ sales for the fiscal year ending September 30, 1979 were in excess of $485 million with advertising expenditures of approximately $5 million.

PAR. 4. Respondents AMC and Jeep individually or collectively engage in the manufacture, advertising, sale, lease or distribution of Jeep CJs. AMC and Jeep cause Jeep CJs to be shipped interstate from various manufacturing locations.

Therefore, respondents maintain a substantial course of business in or affecting commerce, as "commerce" is defined in the Federal Trade Commisson Act.

PAR. 5. The Jeep CJ handles and maneuvers differently from an ordinary passenger car under certain reasonably expected driving conditions; sharp turns or abrupt maneuvers on-pavement may result in loss of control or an accident.

PAR. 6. The facts alleged in Paragraph Five are material facts which if known would be considered in a consumer's purchase and use decision. Respondents' have failed to disclose these facts. Such

failure constitutes a material omission of fact and is therefore a deceptive act or practice.

PAR. 7. By and through the use of advertisements such as "Legendary" and "Luxury" (copies of which are attached hereto and identified as Exhibits 1 and 2 and incorporated by reference herein) and other advertisements not specifically set forth herein, respondents represent, directly of by implication, that the Jeep CJ may be driven on-pavement like an ordinary passenger car.

PAR. 8. In light of the advertising representations referred to in Paragraph Seven, respondents' failure to disclose facts referred to in Paragraph Five renders the advertisements misleading and is therefore a deceptive act or practice.

PAR. 9. Respondents' acts or practices as alleged above have the capacity and tendency to mislead members of the public. Such acts and practices may prevent consumers from making informed purchase and use decisions. Therefore, such acts or practices cause substantial economic injury to members of the public and deprive consumers of information necesary for proper use of the vehicle when driven on-pavement.

PAR. 10. The aforesaid acts or practices of respondents are all to the prejudice and injury of the public and constitute deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. These acts and practices, as herein alleged, are continuing and will continue in the absence of the relief requested.

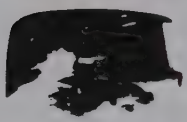
COMPTON ADVERTISING, INC.
625 Madison Avenue, New York, N.Y. 10022
Telephone: PLaza 4-1100

CLIENT: JEEP CORPORATION
PRODUCT: 1981 JEEP CJ
TITLE: "LEGENDARY"
COMML. #: AOJU 2973 TIMING: 30 SECONDS
DATE: 9/22/80

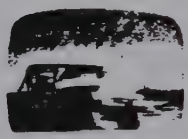
1. (MUSIC UNDER) ANNCR: (VO) The legendary Jeep vehicles.

2. They've been transporting troops...

3. delivering mail...



4. weathering storms...



5. and winning races longer than a lot of vehicles have even existed.

6. Today's Jeep CJ is taking more kids to school...

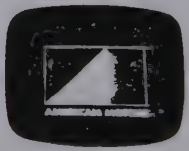
7. more couples out on the town...

8. and more families to paradise lost than ever.

9. And, getting more miles per gallon than any four-wheeler built in America.

10. 1981 Jeep CJ. The legend lives on.

11. From Jeep Corporation...

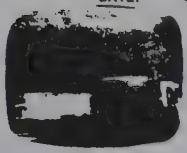


12. of American Motors. (MUSIC OUT)

COMPTON ADVERTISING, INC.
625 Madison Avenue, New York, N.Y. 10022
Telephone: PLaza 4-1100

CLIENT: JEEP CORPORATION
PRODUCT: 1981 JEEP CJ
TITLE: "LUXURY"
COMML. #: AOJU 2983 TIMING: 30 SECONDS
DATE: 9/22/80

1. (MUSIC UNDER) ANNCR: (VO) The legendary Jeep CJ.



2. You always knew it could take you here in style.

3. But did you ever think it could take you here in style?

4. Or that it could give you the luxury and comfort of soft bucket seats,

5. room for 4,

6. air conditioning, stereo...

7. and did you know that Jeep CJ

8. has the highest gas mileage of any four-wheeler built in America?

9. 1981 Jeep CJ.

10. Now you know why the legend lives on.

11. From Jeep Corporation...

12. of American Motors. (MUSIC OUT)

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent American Motors Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business at 27777 Franklin Road, Southfield, Michigan.

Respondent Jeep Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada with its office and principal place of business at 27777 Franklin Road, Southfield, Michigan.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

Order

This Order applies to respondents American Motors Corporation (hereinafter "AMC") and Jeep Corporation (hereinafter "Jeep"), their successors, assigns, officers, agents, representatives, and em-

ployees, directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale, lease or distribution of Jeep CJ(s) in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States.

Definitions: For purposes of this Order, the following definitions shall apply:

1. *Jeep CJ(s)* shall mean CJ–5, CJ–6, or CJ–7 model Jeep vehicles built since 1972, which are or were manufactured or distributed by AMC or Jeep, and vehicles of substantially equivalent design and performance. Substantially equivalent performance means a vehicle which is substantially similar with respect to its ability to make sudden sharp turns and abrupt maneuvers on-road. For purposes of this definition, other Jeep motor vehicles built from 1972 to 1982 are not of substantially equivalent design to Jeep CJs.

2. *Dealer(s)* shall mean all independent person(s), partnership(s) or corporation(s) which, pursuant to a dealer's sales and service agreement, receive on consignment or purchase new Jeep CJ(s) from AMC or Jeep for resale or lease to the public. The term *dealer(s)* shall also mean all person(s), partnership(s) or corporation(s) owned or operated by respondents which sell or lease new Jeep CJ(s) to the public.

I.

It is ordered, That respondents shall, within 120 days from the date of service of this Order, affix a sticker to each new Jeep CJ vehicle manufactured or distributed by AMC or Jeep. The sticker shall read as follows:

This multipurpose vehicle handles and maneuvers differently from an ordinary passenger car. As with other vehicles of this type, sudden sharp turns and abrupt maneuvers may result in loss of control. Read driving guidelines in Owner's Manual and Supplement.

WEAR SEATBELTS AT ALL TIMES

Respondents shall affix the sticker to the instrument panel or windshield frame of each new Jeep CJ in a prominent location. The sticker shall be printed in a typeface and color which are clear and conspicuous. Respondents shall advise their dealers in writing not to remove the sticker.

II.

It is further ordered, That respondents shall, within 120 days from the date of service of this Order, distribute an informational supplement to the Owner's Manual for new Jeep CJ(s) (hereinafter "Supplement") which is similar in scope and subject matter to the current pamphlet "Driving Your 4-Wheel Drive Vehicle" a copy of which is attached as Exhibit A. The supplement shall include the following statement in an on-pavement driving section:

Utility vehicles have higher ground clearance and narrower track to make them capable of performing in a wide variety of off-road applications. Specific design characteristics give them a higher center of gravity than ordinary cars. An advantage of the higher ground clearance is a better view of the road allowing you to anticipate problems. They are not designed for cornering at the same speeds as conventional 2WD vehicles any more than low-slung sports cars are designed to perform satisfactorily under off-road conditions. If at all possible, avoid sharp turning maneuvers. As with other vehicles of this type, failure to operate this vehicle correctly may result in loss of control or an accident.

The Supplement shall also include the following statement in the introduction:

As with other vehicles of this type, failure to operate this vehicle correctly may result in loss of control or an accident. Be sure to read on-pavement and off-road driving guidelines which follow.

The above-required language shall be printed in a typeface at least as large as that which is used in the main body of the Supplement. Nothing contrary, inconsistent or in mitigation of the above-required language shall be used in the Supplement.

III.

It is further ordered, That respondents shall, within 120 days from the date of service of this Order, revise the Owner's Manual for new Jeep CJs to include the information that is required by Part II of this Order. Headings, typeface, and other devices consistent with those used for warnings in the Owner's Manual shall be used to ensure clarity and prominence of the information required. Nothing contrary, inconsistent or in mitigation of the information required shall be used in the Owner's Manual.

IV.

It is further ordered, That any substantive modification of the information required by Part II or Part III of this Order may be

made only upon prior written approval of the Commission. A request for approval shall be in writing and shall be deemed granted if not disapproved within 60 days after receipt by the Commission.

V.

It is further ordered, That respondents shall, within 120 days after service of this Order, insert a copy of the Supplement and the Owner's Manual into the glove box of each new Jeep CJ prior to the distribution of the vehicle.

VI.

It is further ordered, That respondents shall provide to each dealer a reasonable number of free copies of the Supplement to enable dealers to make the Supplement available to each prospective Jeep CJ purchaser or lessee who requests it. Respondents shall also provide to each dealer one free point-of-sale display designed to call attention to the Supplement. Respondents shall advise their dealers in writing to (1) maintain such point-of-sale display in a prominent location in the dealer's showroom and (2) provide a copy of the Supplement to each person who requests it. Respondents shall implement the requirements of this Part within 120 days from date of service of this Order.

VII.

It is further ordered, That respondents shall, within 150 days after service of this Order, send by first-class mail to each identifiable current registered owner of Jeep CJ(s) from the 1972 model year to the effective date of this Order the following materials: (1) the sticker required by Part I; (2) the Supplement required by Part II; and (3) a letter advising the owner to affix the sticker to the Jeep CJ. Current registered owners shall be deemed identifiable if they can be traced using the same sources used to develop lists for recall notifications pursuant to the National Traffic and Motor Vehicle Safety Act of 1966.

VIII.

It is further ordered, That respondents distribute a copy of this Order to all present and future personnel who have supervisory responsibility with respect to the subject matter of this Order. Respondents shall secure from each such person a signed statement

acknowledging receipt of this Order. Respondents shall also distribute a copy of this Order to each dealer.

IX.

It is further ordered, That respondents shall maintain documents demonstrating compliance with this Order. Upon reasonable request, respondents shall make available to the Commission or its staff for inspection and copying documents which shall include, but not be limited to, the following:

A. The name and last known address of each owner who was sent the materials required by Part VII of this Order.

B. The name and last known address of each owner whose materials were returned undelivered by the United States Postal Service.

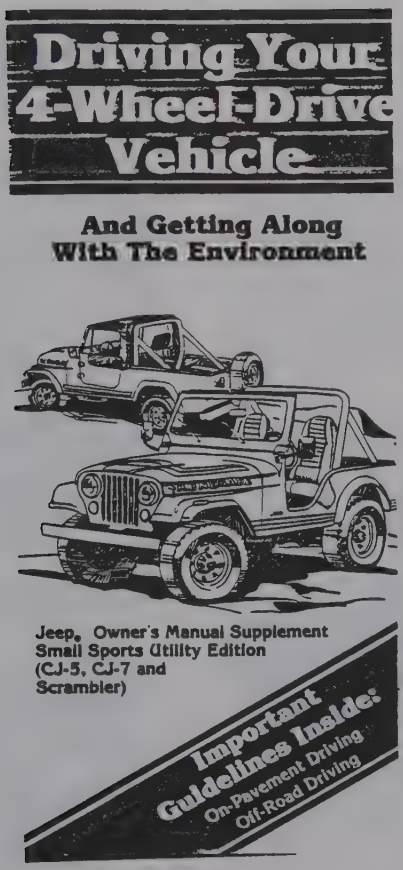
C. Communications from dealers regarding the distribution of the Supplement which are received by the department responsible for such distribution.

X.

It is further ordered, That in the event that respondent AMC or Jeep merges with another corporation or transfers all or a substantial part of its business or assets to any other corporation, respondent AMC or Jeep shall require said successor or transferee to file promptly with the Commission a written agreement to be bound by the terms of this Order; *provided, that* if respondent AMC or Jeep wishes to present to the Commission any reasons why said Order should not apply in its present form to said successor or transferee, it shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said succession or transfer.

XI.

It is further ordered, That respondents shall, within one hundred and eighty (180) and three hundred and sixty-five (365) days after the date of service of this Order, file with the Commission reports setting forth in detail the manner and form in which they have compiled with this Order.


Driving Your
4-Wheel-Drive
Vehicle
And Getting Along
With The Environment
Jeep® Owner's Manual Supplement
Small Sports Utility Edition
(CJ-5, CJ-7 and
Scrambler)
Important
Guidelines Inside:
On-Pavement Driving
Off-Road Driving

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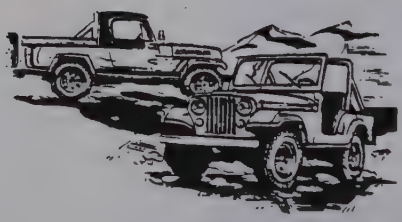
Tips On Saving Fuel 21
A Postscript to 4-Wheelers 22



Welcome To The Exciting And Different World Of 4-Wheeling

Congratulations! You own a Jeep 4-wheel-drive vehicle, the most popular 4-wheeling name in America. The world of 4-wheeling is indeed exciting. You'll be able to enjoy an adventurous part of America, a part of your land few without a 4-wheel-drive vehicle will ever have the opportunity to see.

Along with the fun and excitement of 4-wheeling comes responsibility. Your responsibility is two-fold: The first is to realize that your 4WD vehicle is different than 2-wheel drive vehicles, and must be driven differently than a car both on pavement and off road. The second responsibility is to recognize that, as the owner of a Jeep vehicle, you are obligated to respect the environment. Your actions will affect the future of public lands and their use by responsible 4-wheelers.

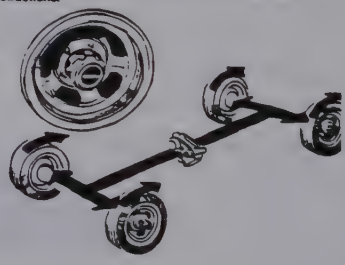
Have fun with your Jeep 4WD vehicle, but remember to live up to your responsibilities.

What Exactly is 4-Wheel Drive?

In 4WD mode, all four wheels can work to move the vehicle. Four wheels working are an advantage over two in many driving situations both on pavement and off road. The key component in the 4-wheel-drive system is the transfer case which supplies power to two separate drive shafts, to the front and rear axles.

Most Jeep CJ-5, CJ-7 and Scrambler vehicles are equipped with part-time or "on-demand" 4WD systems.* This "on-demand" system allows for a normal two-wheel-drive mode for highway use and a simple rigid driveline to the four wheels for off-road or other adverse driving situations. Your Owner's Manual has complete instructions on how to shift between 2WD and 4WD.

*Some CJ-5 and CJ-7 vehicles built between 1973 and 1979 were equipped with a full-time 4WD Quadra-Trac system. Consult your Owner's Manual for complete operating instructions.



Important Differences Between Your Small Jeep 4WD Vehicle And Ordinary 2-Wheel-Drive Vehicles

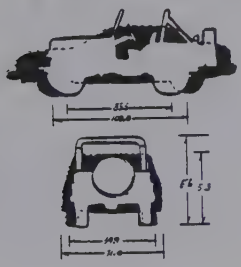
Your Jeep vehicle is a descendant of the original tough quarter-ton military vehicle that served this country so well during World War II. The transition from that legendary military model to civilian versions of the reliable and rugged Jeep models helped start the recreational sport of off-roading. With the introduction of the Jeep CJ-5 in 1954, our CJ models were well on the way to becoming the first choice of more professional and amateur off-roaders than any other 4WD vehicle.

By design it can do things off the road that you would not dream of trying in your family car. Let's examine the main differences between it and most conventional cars.

Your Jeep Vehicle Is Higher, Shorter, Narrower.

Higher ground clearance allows your Jeep vehicle to go over rugged terrain without hanging up on rocks or logs. The higher ground clearance results in a higher center of gravity, which in turn creates handling characteristics different from those of a conventional passenger car.

A shorter wheelbase and short front and rear overhang along with the high ground clearance means that your vehicle can approach inclines and go over the crest of a hill without hanging up the vehicle or damaging its frame or chassis components. The shorter wheelbase also makes your vehicle more responsive to steering than vehicles with longer wheelbases.



3

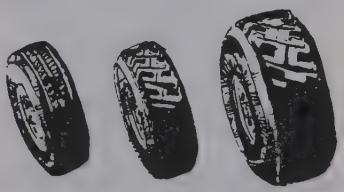
Narrower body width and track allow your Jeep vehicle to go through tight spaces unpassable by conventional cars and most larger 4WD vehicles.

These differences, higher ground clearance, higher center of gravity, shorter wheel-base, and narrower body width and track, are all important features for off-road driving. However, they also mean that on-pavement driving, handling, and steering will be different from what drivers experience with a conventional 2-wheel-drive car.

On the following pages, we will discuss on-pavement driving techniques. Be aware that special tires, size and weight of cargo, or towing a trailer can alter the driving characteristics of your vehicle.

Special Tires. It is important that a 4WD vehicle be equipped with tires of the same size and type at each wheel. So if you use special off-road tires, or tires for mud or snow, mount them on all four wheels. Many serious off-roaders switch to special tires for off-roading. Wide-Tread and Radial-Ply tires must be installed as complete sets. Don't mix radial or wide-tread tires with conventional bias-ply tires or fiberglass-belted tires. This could result in serious steering difficulties. Be sure to check and maintain recommended tire pressure.

Also, some combinations of replacement wheels and tires can increase tread measurement and change the steering and suspension characteristics of your Jeep vehicle. Use only wheels and tires of sizes recommended by Jeep Corporation.



Size and Weight of Cargo. The weight of passengers and cargo can change the center of gravity and the vehicle's handling characteristics. As a general rule, do not carry high or heavy cargo. Never exceed the load limits described in your Owner's Manual and be certain the cargo you do carry is properly placed in front of the rear axle. Too much weight or improperly placed weight over or behind the rear axle can cause serious steering problems, like those experienced in a ordinary car with an [illegible] truck.

Pulling a Trailer. Remember that everything you place in your trailer and vehicle adds to the gross vehicle weight rating (GVWR) of your Jeep vehicle. Do not exceed the gross vehicle weight rating for your Jeep vehicle. Pulling trailers heavier than Class I (2000 pounds, 900kg) Trailer Weight and a Tongue Limit of 200 pounds (90 kg) is not recommended for most small Jeep 4WD vehicles. Consult your Owner's Manual for specifics

4

Getting Along With The Environment

Before you get into the specific techniques of four-wheeling, please thoughtfully consider the "responsibility" we spoke of on page one, "...to recognize that as the owner of a Jeep vehicle you are obligated to respect the environment."

We all have an important stake in protecting the environment because we want future generations of four-wheelers to also enjoy the fragile beauty of this land, unmarred and undamaged.

The vast majority of off-road vehicle owners consistently demonstrates a deep and abiding respect for the environment. Join with the majority. Your positive action and good example are always needed to offset the irresponsible antics of a few thoughtless drivers.

Consider the ability to explore an America you might never see in a 2WD vehicle as a privilege. You can pay for that privilege by always respecting the land and environment.

If you keep the following guidelines in mind, you'll be doing your part in maintaining a healthy environment.

- If you enjoy 4-wheeling for sport, be sportsmen enough to do so only in areas designated for such use. Remember, you are the visitor and your "visit" should leave no scars on the land.
- Drive on established trails only. There are many designated for 4-wheel-drive vehicles exclusively.
- Don't litter and if you see your favorite area littered, clean it up. Set a good example for the next person.
- Stay off land posted against such use. And observe the laws and regulations of every public authority. If you are unsure as to the status of a road or trail, consult your local Forest Ranger or the Bureau of Land Management office.
- Leave the wildlife alone. Disturbing the balance of nature harms us all.
- Keep your vehicle in good mechanical condition for safety's sake and to prevent excessive exhaust fumes.
- Maintain a clean, safe camp. Be especially careful with fire. Do not leave campfires unattended and make sure they're drowned out before you break camp.
- Don't take advantage of the land you're driving on. Avoid cutting switchbacks; avoid wet meadows; do not spin your wheels unnecessarily. Your wheel tracks could cause erosion or other damage.
- Have respect for your fellow 4-wheelers.
- When driving in areas that are exceptionally dry, avoid idling your vehicle or parking in a spot covered by dry grass or leaves. Vehicle exhaust systems give off a great deal of heat which can set fire to dry vegetation.
- Join your local off-road vehicle club as a working member and help spread the word on the proper use of our outdoor resources.

5

On-Pavement Driving Guidelines

Because you will often use your Jeep vehicle on paved roads or highways, it is important that you know how to handle your vehicle in traffic properly and responsibly. The next pages in this brochure provide important guidelines to help you enjoy your Jeep vehicle during on-pavement uses while looking out for the safety of yourself, your passengers, other motorists, and pedestrians.

Know Your Vehicle

Learn specifically how to drive your vehicle on pavement! Start slowly and practice in an area where you can become familiar with its unique characteristics. There may not be much body lean in some turns because the vehicle suspension is different from a car's suspension. This makes a big difference. Body lean is one of the things that make you aware that centrifugal force (see explanation of centrifugal force on facing page) is at work. A few practice sessions and you will realize there are things you can't expect your Jeep vehicle to do on pavement, just as there are things you wouldn't expect your family car to do off road.

Driver And Passengers Should Be Secured At All Times By The Restraint System

Your Jeep vehicle is equipped with restraint systems. Use them at all times. National Safety Council statistics indicate clearly that restraint systems reduce injuries. This can be particularly true in an open-body vehicle.

Drive Slowly! Be Cautious! Be Alert!

We are all familiar with the term defensive driving. It simply means to be prepared. Learn to anticipate problems and to steer, brake or accelerate accordingly. Give yourself time to react to emergency situations. Observe the guideline of at least a car length of space between you and the vehicle ahead of you for every 10 miles per hour you are driving. When weather is bad, and at night, allow even more space so you'll be able to react smoothly, safely.

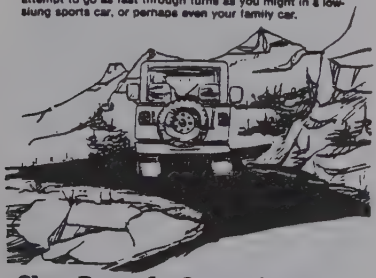
8

Avoid Sharp Turning Maneuvers

Small utility vehicles have higher ground clearance and narrower track to make them capable of performing in a wide variety of off-road applications. Specific design characteristics give them a higher center of gravity than ordinary cars. They are not designed for cornering in the same fashion as conventional 2WD vehicles any more than low-slung sports cars are designed to perform satisfactorily under off-road conditions. An advantage of higher ground clearance is a better view of the road allowing you to anticipate problems. If at all possible, avoid sharp turning maneuvers.

Approach Curves Cautiously, Slowly

The proper speed at which to take a curve is determined in part by the centrifugal force that will be exerted on the vehicle. Because of your Jeep 4WD vehicle's higher center of gravity, the effects of centrifugal force are different from those experienced with a typical car. Therefore, you should always approach curves at normal driving speed. You should not attempt to go as fast through turns as you might in a low-slung sports car, or perhaps even your family car.



Slow Down In Crosswinds

Strong gusting winds hitting the side of any vehicle can affect stability. Driving slower under these conditions will minimize the effects and give you more control.

Proceed With Care On Roads With A Pronounced Slope To The Shoulder

All roads are designed with a "crown" or high center so water will drain off the surface. Occasionally you may find yourself on older, resurfaced, narrow, two-lane roads with a higher-than-normal crown. These roads can cause an exaggerated lean toward the shoulder in your vehicle. You can counteract the exaggerated lean by driving close to the crown, without crossing the highway divider. If the road is also winding with a lot of dips and rolls, you may have to drive more alertly and slowly.

Regularly Check And Maintain Your Vehicle Equipment

Keep your vehicle in top running order. Make frequent routine checks of the vehicle's steering system, power train, brakes, springs, shocks and above all, tires (both tread and [illegible]).

Road Conditions And Surfaces Affect The Way You Drive

Your on-pavement driving will involve a variety of paved surfaces, each requiring somewhat different handling responses from the driver. There are super highways and country roads, city streets and sometimes-rough rural roads. Some surfaces are concrete, some are asphalt-layered, smooth or pebbled, and some are barely blacktopped. Weather conditions affect all these surfaces, calling for still more alertness and skill on the part of the driver. On the following pages we will discuss some of the techniques for driving on various paved surfaces and under different weather conditions.

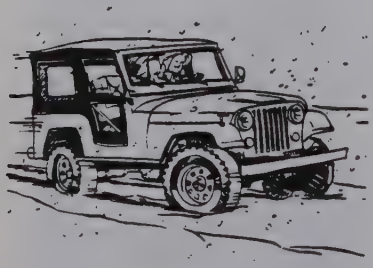
On-Pavement Driving In Adverse Weather

When the road surface becomes difficult to travel because of deteriorating weather conditions such as snow or heavy rains collecting on the roadway, you should shift into 4WD. Whenever the conditions call for slow speeds and high traction you will want to use the versatility of your "on-demand" 4WD system. You should continue to proceed slowly and cautiously. Be alert to the problems fellow drivers around you may be having that could create a hazardous situation for you.

Snow

In wet, light snow it is important to maintain traction by making slight or gradual changes of speed and by maintaining a light touch on the steering wheel. Avoid sudden maneuvers. If you should start to slide, stay off the accelerator and steer in the direction of the slide. Once the vehicle straightens out, lightly accelerate to get back on the line you were traveling. Drive slow and allow plenty of room to maneuver between yourself and the vehicle ahead. If you must brake, use a light, tapping action. Engine compression can help slow you down. It's also wise to use a lower gear under these conditions.

In heavy snow, maintaining momentum is the key to safe going. Try to keep moving by using the lowest possible range in your transmission and a steady accelerator pedal. Special snow tires can help. Under special conditions chains on all four wheels can provide additional help. Never drive with chains on the front and not on the rear.



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General Recommendations For Driving In Adverse Weather

Safe driving with a 4WD Jeep vehicle requires the sensible application of long-established principles of safe driving:

- Drive smoothly—no sudden, jerky movements
- Stay alert—anticipate your next move
- Do not overdrive road conditions or your abilities
- Do not drive while under influence of alcohol or drugs

In addition you should:

- Use 4WD when road surface requires slow speeds and high traction
- Turn on your headlights
- Use windshield wipers (rain or wet snow)
- Check rearview mirrors frequently
- Drive slowly
- Allow extra following distance
- Keep tires properly inflated and in good condition

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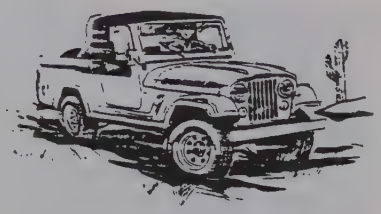
Off-Road Driving Guidelines

Off-road operation is what your Jeep vehicle was designed to do. Under almost all conditions engage 4WD. But as you leave the pavement behind, you should be guided by the principle that although your 4WD vehicle might be able to go almost anywhere, there are places you shouldn't go. Use common sense and remember that driving situations and conditions change quickly out there, so be alert and be prepared. As a general rule you should go where others have gone before. There are plenty of 4WD trails or unimproved roads to take you to the great outdoors. In fact many of the surfaces you'll travel will be unpaved, with a sand or gravel base or a surface that rain has turned to muck. These surfaces call for different driving techniques from paved roads.



Sand

Sand or dirt roads that are dry and dusty are often characterized by "loose" or "soft" shoulders and curves, while the crown of the road may be rock hard. Ideally you should have all four wheels on the solid surface, so drive as high up on the crown as possible while staying on your side of the road. You may want to drive in third gear (or in second range if you have automatic transmission) and you should proceed slowly and cautiously, avoiding abrupt steering changes. Also, be alert for rutted or choppy road surface, especially the kind of surface that might cause your vehicle's wheels to leave the ground. As a general rule, on pavement or off, keep your vehicle in a situation where at least three wheels are on the surface at all times.

Mud

Driving in mud is similar to driving in snow. When a hard-packed dirt road is wet from rain there's a slick film of mud on the top that can cause loss of traction even in 4WD mode. Keep a very light foot on the accelerator and a fingertip touch on the steering wheel. Ride high up on the crown of the road and stay away from sudden maneuvers that could cause you to slide toward the shoulders where the mud may be several inches deeper. If your vehicle begins to slide, take your foot off the accelerator and steer in the direction of the slide until control is regained.

In hub-deep mud, as in heavy snow, the objective is to maintain your momentum. Use your lowest transmission gear or range and keep a steady foot on the accelerator pedal and a firm hand on the wheel to maintain your direction. Above all, don't stop. Drive at a steady speed even with the wheels spinning. Of course, mud or snow tires would give extra bite.

Gravel

Your vehicle will perform very well in 4WD mode on graded gravel surfaces. Maintain a moderate, steady speed and firm control of the steering wheel, avoiding sudden maneuvers that could cause the vehicle to slide. Stay on the crown of the road as much as possible, because gravel at the edge may be looser and the footing less stable. If your vehicle does start to slide, take your foot off the accelerator and steer in the direction of the slide until you regain control. Allow yourself enough distance to stop, using a combination of light brake tapping and engine compression.

In loose gravel, as in deep snow or mud, you should maintain your momentum. Use your lowest transfer case mode and keep a steady foot on the accelerator, and a good grip on the wheel for directional stability.

11 12

General Recommendations For Off-Road Driving

Before you head for the back country there are some general things you should do or check:

() Remind yourself when to use 4WD mode
() Use safety restraint system
() Check fuel, oil and fluid levels
() Cargo and gear fastened down
() Travel in pairs
() Let someone know your plans and schedule
() Secure necessary permission to travel on public or private land
() Stay on existing trails wherever possible
() Respect the environment and leave it as you found it
() Be alert and use common sense
() Supplies check list:

- Warm (cold) weather gear
- Rain gear
- Blankets (sleeping bag)
- Food and water
- First aid kit
- Walking shoes
- Flashlight
- Maps & charts of area
- Tow strap or chain
- Wheel blocks
- Booster cables
- Tire chains
- Spare vehicle keys
- Two way CB radio
- Spare fan belt(s)
- Spare tire (more than one for extended trips)
- Fire extinguisher
- Mechanic's tools
- Hatchet (axe)
- Utility knife
- Ice scraper or brush
- Portable air compressor
- Electrical tape
- Vehicle repair manual
- Waterproof watches
- Approved gas can
- Syphon hose

Driving Off-Road On Steep Inclines And Sidehills

Before reviewing how to drive up steep hills and along sidehills, make note of an important point. If you don't make it to the top, or your vehicle is about to slide or roll sideways, stop, turn off the engine, put it into first gear, put on the parking brake and get out and walk down. An ounce of prevention is worth a pound of cure.

Steep Inclines

When preparing to climb a steep incline, first try to find out what you're up against. What's on top? Walk the course to make sure you know. And if you don't think you can make it, don't try it!

Also, it's always a good idea to make at least one exploratory run before the final attempt. This lets you feel out the surface and assess how much effort is going to be required to go over the top. (Low range and first or second gear.) When the tires begin to spin, apply a little extra gas and let them dig in slightly. Then you can clamp on the brakes and hang there in the dug-outs while you shift into reverse and drive back down. That's right - in reverse gear, clutch out and driving. Absolutely not in neutral and trying to let yourself down on the brakes. And to avoid sidero! remember never turn your vehicle sideways on a hill or steep incline.

On your attempt, give yourself a running start. Accelerate to the hill and then, just as you approach the top, ease off the gas. You do this for two reasons. First, it's never a good idea to crest a hill at full power. The second is that, very often, this lets your bouncing, scrambling vehicle settle down to grind out the over-the-hump traction that's needed. So, accelerate, scramble and then ease off!

Getting down can be as tricky as going up. Maybe trickier. Keep the vehicle heading straight downhill, in gear (low range/first gear) and under control. If it begins to slide, as it will on a steep enough grade, touch the gas to regain steering control, then let off the gas. Don't lock up the brakes. You can't steer a skidding wheel. Touch the gas instead. It'll straighten you out. Locking the brakes can only get you into trouble.

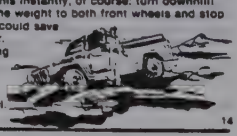
Sidehills

Traveling across the side of a hill is extremely hazardous. It should not be attempted. If it is absolutely necessary on a hill which is not very steep it should always be done with extreme caution. Whenever possible, avoid doing it! And too, when you're getting out of your vehicle on a sidehill, be sure to exit on the uphill side.

Surfaces on sidehills are deceptive. You may have been running along a ridge that seemed perfectly solid but once you got onto the sidehill it wanted to slip out from under you. The problem comes from the fact that when you're driving across a side slope the vehicle's weight is transferred to the lower side. Instead of having the weight distributed to four tires, it's almost all on two. This makes the vehicle want to slide down the hill sideways.

When it starts to slide, there's only one thing you can do, and you have to do this instantly, of course: turn downhill! This helps transfer the weight to both front wheels and stop the slipping—and it could save you from rolling over.

Once you're angling downhill, take care not to lock up the wheels and start sliding out of control.



Driving Off-Road On Rock And Sand

Before discussing driving on rocks or sand, one caution is necessary. After you've driven in rocky or sandy situations, your brakes should be inspected for any residue in the lining. Heavy-duty maintenance is suggested as the lining wears out quickly if not cleaned after such uses.

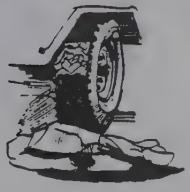
Rock

The basic technique for driving in rock consists of four letters: S-L-O-W. Low range. Crawl up. Creep down. And even that is sometimes too fast!

If you have automatic transmission, then use your brake to ease yourself down off that rock you so deliberately climbed up. With a manual transmission, let it walk down the rock against engine compression. You'll kill the engine occasionally, but that's the way to do it.

If you have a choice between driving a wheel over a large rock or letting the rock go under the vehicle, always put the wheel on it. Squarely on it. Then you know where the rock is and that isn't going to high-center you or damage your vehicle undercarriage.

If you do get high-centered (hung up on an object that lifts one or more wheels from firm contact with the ground and keeps you from going on), the first thing to try is to back off. If this doesn't help, then you have to get serious about solving the problem. This means jacking up the wheel that isn't getting a grip. Under this wheel you stuff rocks, dirt, wood, brush, whatever. You do this until, in effect, the road has been built up to the point that you can drive off the offending object. Then move the vehicle—SLOWLY—after removing the jack.



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Sand

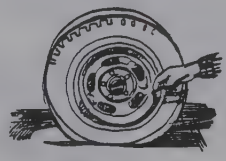
The technique for driving in sand involves two or three principles, the most important of which is stay on top of it. You can do this by driving with enough speed to maintain momentum, by having big tires, or by greatly reducing the pressure in your normal-size tires. Remember - if you do reduce tire pressure and drive on deflated tires you risk premature wear on the tread. Also make sure that whatever tires you use are approved by the vehicle manufacturer.

If you have a short patch of soft sand to be crossed, you can usually rush it and make it across. Study the situation, decide where you're going to go, then back up, take a little run at it and move through at a steady pace, not stopping, not making abrupt changes of direction, and not hesitating on the way.

If you're into serious sand - a sand wash you're going to travel, or dry loose sand at the beach, or some big dune - and don't have oversize tires, there's a likelihood you're going to need to let air out of your tires. The reason for this is that a soft tire is better able to conform to whatever surface it encounters than is a hard tire. So a soft tire will develop grab-on and provide go-ahead traction where a hard tire won't.

The tire should be less than 10 psi. So soft you can see a definite bulge in the sidewall where it's in contact with the surface. With flabby tires you can travel sand with relative ease. (Don't forget to reinflate when back on hard land! Just a few miles on pavement could cause substantial damage to your tires.)

If driving on an ocean beach be sure to thoroughly wash under carriage to prevent corrosion.



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Driving Off-Road In Mud And Rain

Mud

The problems encountered in mud are somewhat similar to those of driving in snow in that there's both a reduction in traction and an increase in resistance to forward motion.

A contributing problem is that mud comes in a wide variety of consistencies that range all the way from light, greasy clay to a thick, liquid bog. All of them require slightly different driving techniques.

In general, though, what they require is well-controlled go-ahead power. In most instances this means low range and either first or second gear depending on the mud's particular characteristics.

So when you come to a muddy stretch, get into the lower gear and keep in mind that you don't want to lose headway. Once you're committed to the bog, don't stop, don't hesitate, don't change your mind halfway through. Churn, churn and keep churning until you're on firm footing again.

At the other extreme is a slick film of clay. Here you use some of the same techniques as driving on ice. Especially staying on or near the crown of the road.

Rain

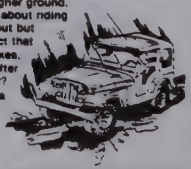
Ordinary rain creates no conditions that require special techniques from the driver of a 4-wheeler. Except extra caution, of course. Unusually heavy rain can lead to conditions where special driving techniques may be needed, however.

Floodwaters always demand extreme caution. Driving into unknown water is like walking around blindfolded. That drop-off may only be an inch or two. Or it may be a precipice.

When it is necessary to drive through deep water, get into low range and maintain a steady, slosh-ahead pace. Be very careful about stopping broadside in a stream of running water. Running water exerts immense force against anything as flat-sided as an automobile and this could result in the vehicle being swept downstream with the current.

Even when only a few inches of water are running, don't stop if you're on an unpaved surface. Moving water may wash the footing out from under your tires and make it impossible for you to get underway again. (The same principles apply if you're driving along the beach and get caught by a wave.) Don't stop. Keep moving. Head for the higher ground.

You probably already know about riding wet brakes to help them dry out but have you considered the effect that sand and silt can have on brakes, wheel bearings and the like after running through muddy water? It's always wise to give them a thorough inspection after exposure to such conditions.



Driving Off-Road On Snow

Snow can be troublesome in different ways. When it's either hard-packed or soft-melting it can be slick. This creates a traction problem. At other times, it can get so deep it piles up in front of the tires and resists their progress. This gives you a problem in maintaining headway.

When the snow is slick, drive it like any other slick condition. That is, a light touch on the steering wheel, make gradual changes in throttle opening to avoid breaking traction and don't do anything sudden. Don't let a slide start. And if it does, catch it.

But let's say it's nice dry snow. But deep. Then what do you do? If it's deep enough to provide more than minor resistance, put the vehicle in a lower gear. Low range is even better. Then shove your way through and try to hit a happy medium between spinning your tires and keeping headway not to bog down. A nice, even, steady pace is always best.

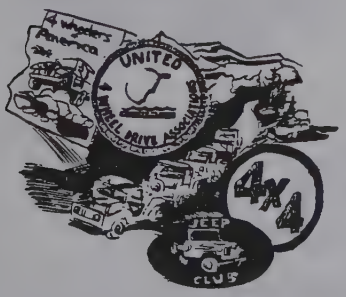
If you have to break trail in deep snow and are going to use chains, it's not a bad idea to put them on the front wheels. At the low speed you'll be moving, the chains will help the steering as well as the go-ahead traction. But in normal circumstances, never put chains on the front unless you also have them for the rear. If you have to brake hard with chains only on the front, the rear wheels will lock and slide, making the rear end want to come around.

4-Wheel-Drive Clubs And Activities

What They Can Do For You

With the high interest in off-roading many recreational opportunities have opened up. Across America, more than 1,500 4-wheel-drive clubs have been formed. Their role: To make 4-wheeling more than just transportation, to make it an enjoyable, exciting family pastime. Clubs can be organized for many reasons, depending upon the common interests of the people involved. Some like the challenge of competitive events. Others become dedicated to the specially organized search-and-rescue units. And still others take great pride and pleasure in projects which further the cause of conservation. Whatever your reason, being a member of a 4-wheel-drive club can be an enjoyable, rewarding and productive experience.

All you need to start a club are some enthusiastic 4-wheelers, a name for your club and a club philosophy to be shared by the members. Then once you've organized and elected officers, you'll find a great variety of events and activities in which to take part. 4-wheel-drive trail drives, rallies, safety clinics, obstacle course events, women's events, ecology and clean-up drives are all popular club activities. In addition, affiliation with one of the regional member associations of United Four Wheel Drive Associations offers the advantage of learning about regulations, legislation, safety and 4-wheel-drive events as well as other club activities which might affect clubs. For more information write: Jeep Corporation, 37200 Ammem Road, Livonia, Michigan 48150, ATTN: 4WD Club Information.



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Special Off-Road Uses: Rallies And Racing

If you want to participate in competition events in your 4-wheel-drive vehicle, you have a wide choice. You can find ones that range all the way from informal family tours or club sponsored hill climbs to all-out off-pavement races in Baja, California or full-scale international rally type events like the infamous "London-to-Sydney Rally".

Safety is a prime concern for all events. The extent of safety equipment preparation will depend on the activity in which you participate. Even the most casual club event will require seat belts, a roll bar and a crash helmet. In competition, most race organizations insist on a fully braced and gusseted rollcage along with such things as competition seat harness, fire extinguisher, flame-resistant driving suit, fuel cells and so on. Double shocks, reinforced frame, beefed-up suspension highly modified engine and drive train and even lightweight body parts are really helpful, too.

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Tips On Saving Fuel

More than ever before, fuel economy is the password to the 80's. How do you get it without sacrificing the freedom and enjoyment you got your 4-wheel-drive vehicle for? Here are some helpful fuel tips.

- Plan ahead. That means, know where you're going and how to get there before you leave. Naturally you'll want to leave home with a full tank as well as make sure you fill up on your return. Some private camping areas have even installed their own fuel storage tanks and will guarantee a tank of gas when you stay overnight.
- Drive with the windows closed whenever you can. Open windows add substantially to wind drag. And the more wind drag, the more gas used. In fact, at highway speeds mileage can be lowered up to 10 per cent when the windows are open.
- Slow down. Speed kills any hopes of gas efficiency. The best idea is to keep your top speed under 55 mph. After you find a steady speed, maintain it. Changing speed by as little as 4 mph can increase fuel consumption by over 1 mile per gallon. Remember, don't brake unnecessarily.
- If you're going to idle longer than 60 seconds, you save gas by turning the engine off. An idling engine wastes about a quart of gas every 15 minutes. And don't warm up the engine by idling. It warms up faster by driving.
- "Jack Rabbit" starts are disastrous on gas mileage. Accelerate slowly. Transportation tests have proved that jumpy starts and fast getaways can burn over 50% more gasoline than normal acceleration.
- Keep your eye on the road. Ease up on the pedal if you see a traffic jam ahead. It can take up to 20% more gas to get to normal speed from a full stop than it does from 4 mph.
- Maintain your Jeep vehicle. Keep the engine properly tuned. Use the proper multi-weight motor oil, preferably a synthetic. Make sure your air filter's clean. Add 4 or 5 psi to the correct tire pressure. In other words, do what you have to, to put your vehicle in top condition. Then keep it that way. You could stretch gas mileage by 15%.
- Don't overload. Recall the unnecessary gear you had with you on your last trip!
- Avoid filling your tank to the brim, because gas expands in the sun. Buy your gas in the morning when you start driving. This way when the sun gets to it, it'll have room to expand in your tank

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A Postscript To 4-Wheelers

The key to your 4-wheel-drive vehicle unlocks a whole new world. Yours to enjoy and make the most of. You are now armed with many of the facts and lots of information to make your off-road journeys successful ones. We will leave you with some last-minute hints and words to the wise!

- Leave every place you've been as beautiful and serene as you found it.
- Be prepared for emergencies! Always carry a first aid kit, extra food and water, a compass, a "Confidence Kit" made up of tools, tire irons, jacks, CB Radio, etc. You won't regret it.
- If you've gone too far off-road and are just plain lost, stay calm. Use your compass, try to orient yourself and conserve some gas. You'll need it to get out.
- Use your common sense. It generally works when all else fails.
- Travel in groups, no less than two vehicles per group.
- Secure permission to travel on trails, or make sure you're driving on approved 4-wheel-drive terrain.
- Take care of your vehicle....it will take care of you.

- Wear Seat Belts At All Times.

And Lastly, Welcome To The Exciting World Of 4-Wheeling!

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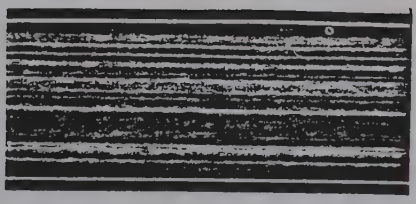

Wear Seat Belts
At All Times.

Jeep

A Subsidiary Of American Motors Corporation
Jeep Sales Promotion & Merchandising
27777 Franklin Road, Southfield, MI. 48034

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First Printing
5/81

IN THE MATTER OF

THE TIMES MIRROR COMPANY, INC.

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9103. Complaint, July 27, 1977—Dismissal Order, July 8, 1982

This order returns the matter to adjudication and dismisses the complaint charging a Los Angeles, Calif. publisher with adversely affecting competition by the use of a discriminatory rate structure for run-of-the-paper and suburban display advertising. Having considered the views of the parties and the comments received from the public, the Commission concluded that the public interest would best be served by rejecting the consent agreement and dismissing the complaint.

Appearances

For the Commission: *Carleton C. Eastlake, Jon R. Calhoun* and *Caprice L. Collins.*

For the respondent: *Julian O. von Kalinowski, John J. Hanson, J. Edd Stepp, Jr., Joseph A. Collins* and *R.C. Lobdell, Gibson, Dunn & Crutcher,* Los Angeles, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. 41, *et seq.*) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the party listed in the caption hereof and more particularly described and referred to hereinafter as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45) and Section 2(a) of the Clayton Act, as amended, (15 U.S.C. 13) and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Times-Mirror Company, Inc. is a corporation organized on or about October 6, 1884, and is existing and doing business under and by virtue of the laws of the State of California. Respondent maintains its home office and principal place of business at Times-Mirror Square, Los Angeles, California.

PAR. 2. Respondent is the largest publicly-held publishing company in the United States. Its newspaper publishing revenues were

approximately 44% of its total revenue in 1976, or about $426 million.

PAR. 3. Publication of the *Los Angeles Times* newspaper is the largest operation of respondent Times-Mirror Company. The *Los Angeles Times* enjoys an average daily circulation in excess of one million copies, and has the largest weekday circulation among the nation's standard-size newspapers. The *Los Angeles Times* has for many years led all newspapers in the nation in advertising volume. Its total advertising revenues for 1976 were approximately $276 million, with retail display advertising approximately one-half of total advertising revenues.

PAR. 4. In connection with its newspaper publishing operations, from its home and branch offices, respondent solicits, offers to sell and sells advertising linage in the *Los Angeles Times* to purchasers located in the various States of the United States. In the course of such operations it frequently sends and receives contracts, rate cards, advertising materials, billings and payments across state lines.

The acts and practices herein described in connection with the promoting, offering for sale and sale of newspaper advertising linage to retail merchandisers are "in or affecting commerce" as the term "commerce" is defined by the Federal Trade Commission Act, as amended, and "in commerce," as defined in the amended Clayton Act.

PAR. 5. The *Los Angeles Times* is distributed and sold primarily in Los Angeles County, Orange County, Riverside County, San Bernardino County, San Diego County, San Luis Obispo County, Santa Barbara County, Tulane County, and Ventura County in California; with some addtional distribution in numerous other states and the District of Columbia. For example, the *Los Angeles Times* has a significant and substantial distribution in the State of Arizona and in Clark County, Nevada.

PAR. 6. In the course and conduct of its business, respondent has been and is now offering to sell and sells advertising linage to various purchasers, including, among others, persons, firms and corporations engaged in the manufacture, distribution, offering for sale or sale of merchandise at retail. A substantial number of the retailer purchasers of respondent's advertisers have retail outlets in other states as well as California. The advertising linage purchased is used for the purpose of offering for sale or promotion of products, labels and materials.

PAR. 7. Retail merchandisers who purchase advertising linage in the *Los Angeles Times* have also promoted merchandise to customers

in adjoining states, who travel into California to purchase products or purchase them by mail order. Marketers of merchandise offered for sale and sold at retail, who purchase advertising linage in the *Los Angeles Times,* also promote sales in some out-of-state locations thereby.

PAR. 8. In the course and conduct of its business, respondent has been and is now discriminating in price, directly or indirectly, between different purchasers of its advertising linage of like grade and quality, by selling said commodities at higher prices to some purchasers than it sells to other purchasers, many of whom have been and now are in competition with the purchasers paying the higher prices. More specifically, respondent offers for sale and sells advertising linage to persons, firms or corporations engaged in the offering for sale, sale and distribution of merchandise at retail, including, but not limited to, apparel and accessories, appliances, and furniture. Such sales are made on the basis of a rate structure that results in higher advertising rates to some competing purchasers than to others.

The aforesaid rate structure provides for a cumulative volume discount on an annual basis according to the number of lines that an advertiser or prospective advertiser may purchase or agree to purchase. Advertisers or prospective advertisers who agree to purchase a specific number of lines may take advantage of yearly bulk contract rates, whereas advertisers or prospective advertisers who cannot and do not contract for a specified number of column lines pay at the "open rate" price level. The price per line purchased decreases as the linage purchased increases. The differences in rates per line are substantial.

PAR. 9. Respondent's use of a cumulative volume discount advertising rate structure results in a substantial and systematic discrimination in the price of advertising linage sold to various customers, in that larger volume advertisers receive more favorable rates than smaller volume advertisers.

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 10. The allegations of Paragraphs One through Nine are incorporated by reference herein as if fully set forth verbatim.

PAR. 11. Respondent's advertising rate structure, and the discrimination in the price of advertising between and among various purchasers of advertising linage, adversely affect competition be-

tween those paying higher and those paying lower advertising rates, and constitute unreasonable restraints of trade and unfair methods of competition in or affecting commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

COUNT II

Alleging violation of Section 2(a) of the Clayton Act, as amended.

PAR. 12. The allegations of Paragraphs One through Nine are incorporated by reference herein as if fully set forth verbatim.

PAR. 13. The effect of respondent's discrimination in prices may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which its favored purchasers are engaged, or to injure, destroy or prevent competition between the favored and non-favored purchasers, and constitute violations of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended.

STATEMENT OF THE COMMISSION

BY BAILEY, *Commissioner*

The Commission brought this case in 1977 out of a concern that the *Los Angeles Times'* discriminatory rate structure for run-of-the-paper and suburban display advertising adversely affected competition by disadvantaging smaller advertisers. In November 1980 the *Los Angeles Times* entered into a negotiated agreement and jointly with FTC staff proposed a consent order for the Commission's consideration.

On September 25, 1981, the Commission, Commissioner Clanton dissenting, provisionally accepted the consent order. At that time, however, the Commission expressed concern about whether the order would work as intended, and whether it was practical or feasible to apply similar orders to newspapers in other markets. The Commission believed it had insufficient data against which to test its concerns and so sought public comment on the order for ninety days.

The comment period produced a broad sampling of opinion: 65 newspapers and broadcasters, 13 media trade associations, 10 retailers, 7 trade associations and four individuals responded. Of the 99 comments received, 98 urged the Commission to reject the consent order.

These comments caused reexamination of two important assumptions which formed the basis of the Commission's original decision to bring the case and on which the proposed consent was based. The

first assumption was that smaller advertisers were injured competitively by the *Los Angeles Times'* cumulative volume discount rate structure. However, all but one of the retailers and retail trade associations which responded opposed the consent agreement and indicated no concern about competitive injury. Their position was reinforced by academics knowledgeable in the field of mass media economics, who concluded that the benefits of the proposed order were fairly speculative, and that the order might well raise prices to all advertisers. Thus, the Commission has concluded that the benefits to competition from accepting this order are much more uncertain than was originally believed.

The comments also highlighted the issue of whether the principles of this order could or should be extended beyond the *Los Angeles Times.* It now appears that to do so within the newspaper industry would be unwise, as the type of uniform pricing required by the order could impair the pricing flexibility of secondary size papers. Were the principles of the order to be extended to other advertising media, the uncertainties as to the trade-offs between vigorous pricing flexibility and the benefits of eliminating price discrimination increase. In particular, making cross-media comparisons for the purpose of assessing a valid meeting competition defense is likely to be impossible. Clearly, however, it was never the Commission's intention, and would be inappropriate now, to leave the *Los Angeles Times* as the only seller of advertising space subject to Robinson-Patman Act principles.

In conclusion, the Commission notes that the process of decision-making in this matter worked precisely as the Commission's Rules contemplate. The scope and depth of public comment contributed greatly to the Commission's ability to reach an informed decision.

SEPARATE STATEMENT OF CHAIRMAN MILLER

In concurring with the Commission's decision today, I am heartened to find that the extensive administrative exercise required to analyze this consent proposal has reached the same conclusion that my analysis of the likely economic consequences, as well as my reading of the law, would have suggested in the first instance.

First, economic analysis and overwhelming public comment have demonstrated persuasively that an order applying Robinson-Patman rules to newspaper advertising could injure competition in this industry.

Second, and more importantly, it seems quite clear that the intent

of Congress was to leave advertising rates outside the reach of the Robinson-Patman Act.[1] While I do not dispute our role of filling inadvertent gaps in antitrust law with enforcement of the FTC Act, that role should stop short of creating law in defiance of Congress.

SEPARATE STATEMENT OF COMMISSIONER CLANTON

I concur with the Commission's decision to dismiss the complaint in this matter not only for the reasons set out in the Commission's statement but for an additional reason that I expressed earlier when I voted not to accept provisionally the negotiated consent agreement. My decision to dismiss this complaint stems from my concerns about extending the coverage of Section 5 of the FTC Act to encompass commercial circumstances on which we reserved judgment in *Reuben H. Donnelley Corp.*, 95 F.T.C. 1 (1980), *rev'd sub nom. Official Airline Guides, Inc. v. FTC,* 630 F.2d 920 (2d Cir. 1980), *cert. denied,* 101 S.Ct. 1362 (1981).

The Commission's opinion in *Donnelley* did not distinguish between an absolute refusal to deal and dealing on discriminatory terms. While we did not foreclose the possibility of reaching price discrimination under Section 5, we emphasized the difficulties of extending a duty to deal into the area of secondary-line discrimination, which is at issue in *Times-Mirror.* In *Donnelley,* we signaled a cautionary note for any future applications of such a duty to deal where the inevitable result would be to involve the Commission in regulatory-style monitoring of the reasonableness of pricing or other on-going activities. 95 F.T.C. at 81. Furthermore, in defining "arbitrary" conduct in *Donnelley,* we indicated that our concern should be limited to "conduct which results in a substantial injury to competition and lacks substantial business justification." *Id.* at 82. I was persuaded earlier and remain persuaded that this matter would not be likely to meet the *Donnelley* standards for liability. At the least, I am persuaded that this possibility is insufficient to justify acceptance of the order, especially in light of the other significant uncertainties associated with the case.

SEPARATE STATEMENT OF COMMISSIONER PERTSCHUK

I have voted to reject the tentatively accepted order against Times-Mirror for two reasons.

First, the benefits to competition from accepting this order are much more uncertain than we had believed. The comments, by

[1] In Senate floor debates, Senator Logan flatly replied, "No," when asked if the Act would require newspapers selling advertising to observe its price discrimination provisions. 80 Cong. Rec. 3115.

newspapers, retailers and academics alike, overwhelmingly support the view that the competitive strength of newspapers themselves require more pricing flexibility than the order allows and that smaller retailers may not be significantly helped by it.

Second, it is clear that, if we were to prohibit newspapers from giving discounts to large advertisers which are not cost-justified, we should apply the same principle to other advertising media which compete with newspapers, including network and cable television. I do not see a realistic possibility that this Commission in the foreseeable future will apply Robinson-Patman principles in this way, and I do not believe it is appropriate to single out Times-Mirror as the only company to be subjected to such standards.

Consequently, I join the Commission in rejecting this particular order. It is important to state, however, that this decision by the Commission does not represent any repudiation of Robinson-Patman principles, only a decision that it would be inappropriate to apply them in this case.[1]

Finally, I note that Times-Mirror, to its credit, argued its position thoroughly and carefully on the merits and through public comment. It did not, as has increasingly become the custom, solicit members of Congress to pressure the Commission, after having heard an incomplete and biased presentation of the disputed issues.

FINAL ORDER RETURNING MATTER TO ADJUDICATION AND DISMISSING COMPLAINT

On November 7, 1980, this matter was withdrawn from adjudication for consideration by the Commission of a proposed consent agreement. The Commission accepted the proposed consent and placed it on the public record on September 25, 1981, for comment pursuant to Section 3.25(f) of the Commission's Rules of Practice and Procedure.

Having considered the views of the parties to the consent and the comments received from the public, the Commission has determined that the public interest would best be served by rejecting the consent agreement and dismissing the complaint. Therefore

It is ordered, That this matter be returned to adjudication and

It is furthered ordered, That the complaint issued in the matter be, and it hereby is, dismissed.

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[1] I agree with Chairman Miller's point in his statement that the Commission should not defy the will of Congress. I therefore am hopeful that the Commission will continue to enforce the Robinson-Patman Act in other industries.

IN THE MATTER OF

LENOX, INCORPORATED

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8718. Final Order, April 19, 1968—Modifying Order, July 12, 1982

This order reopens the proceeding and modifies the Commission's modified order issued on June 24, 1970, 77 F.T.C. 860, by deleting Paragraph 8 from the order, so as to allow Lenox to prevent transshipping of its products by its authorized dealers. The Commission has also included a provision which prevents Lenox from taking disciplinary action against any dealer for transshipment which occurred before the effective date of the order.

DECISION AND ORDER

Whereas, a "Request of Lenox, Incorporated for Modification of Final Order" was filed by Respondent on March 15, 1982 pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. 2.51, wherein Lenox, Incorporated seeks a partial modification of the order that issued on June 24, 1970 by the deletion of Paragraph 8; and

Whereas, the matter was thereafter placed on the public record for thirty (30) days pursuant to Section 2.51(c) of the Commission's Rules of Practice, 16 C.F.R. 2.51(c), during which time comments from the public were received; and

Whereas, the Commission thereafter considered the Petition presented by Lenox, Incorporated and all of the materials and information submitted as public comments on the petition and has determined that the request makes a satisfactory showing that changed conditions of fact and law and the public interest require that the order be reopened for the purpose of modification.

Accordingly, *it is ordered* that the matter is reopened and that the order is modified by deleting the language of paragraph 8 that reads:

Requiring or inducing, by any means, dealers or prospective dealers to refrain, or to agree to refrain, from reselling respondent's products to any dealers or distributors;

It is further ordered, That paragraphs 9 and 10 be renumbered to 8 and 9.

It is further ordered, That nothing herein shall be construed to permit respondent to terminate or otherwise discipline any dealer for (1) having resold respondent's products to any dealer or distributor prior to the effective date of this order or (2) for any such resale

that occurs prior to the dealer's receipt of notice that it may be disciplined for such resale.

Commissioner Bailey voted in the negative.

SEPARATE STATEMENT OF COMMISSIONER PERTSCHUK

I wish to make clear why I voted for Lenox's petition to modify the Commission order prohibiting it from engaging in resale price maintenance. The petition persuaded me that the ban on transshipping, which was included in the order originally only as an *ancillary* means of deterrence, was no longer a necessary safeguard against vertical price fixing by Lenox and could safely be dropped from the order. The petition argued that the requested relief was also necessary to maintain a strong Lenox presence and vigorous interbrand competition in the houseware china business, and that it would not cause a rollback of the gains in intrabrand competition that have occurred during the life of the order. In this regard, I found the petition to be much less persuasive. I do not believe it has been established in this reopening proceeding that competition in the china industry will be improved as a result of allowing Lenox to prevent transshipping of its products by its authorized dealers. However, since Lenox has met the statutory standard for modifying orders by showing that the ancillary transshipping provision is no longer appropriate under the circumstances, it is entitled to the relief granted.

IN THE MATTER OF

BASF WYANDOTTE CORPORATION

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9125. Complaint, April 5, 1979—Final Order, July 12, 1982

This order upholds the Administrative Law Judge's May 14, 1982 Initial Decision in this matter and effects dismissal of the complaint on July 13, 1982. The complaint charged the wholly-owned American subsidiary of a German chemical corporation with antitrust violations in the organic pigments market.

Appearances

For the Commission: *Glenn M. Fellman, James K. Leonard, Leo J. Asaro* and *David Marx, Jr.*

For the respondent: *James T. Halverson, Thomas M. Geisler, Jr., Leonard Gross, Bradford Anderson, Prisilla Elliot, Paul E. Francis* and *John P. Walsh, Shearman & Sterling,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named Respondent, subject to the jurisdiction of the Commission, has acquired the Pigments Division of Chemetron Corporation, a wholly-owned subsidiary of Allegheny Ludlum Industries, Inc., which acquisition violates Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

Definition

For purposes of this complaint the following definition shall apply:

Organic pigments - insoluble color particles characterized by a chemical composition which includes carbon rings or chains as the basic part of their molecular structure and used to impart color to a variety of materials.

BASF Wyandotte Corporation

1. Respondent BASF Wyandotte Corporation (BWC) is a corporation organized under the laws of the State of Michigan, with its principal place of business at 100 Cherry Hill Road, Parsippany, New Jersey. [2]

2. BWC is a wholly-owned subsidiary of BASF America Corporation which in turn is a wholly-owned subsidiary of BASF Aktiengesellschaft (BASF A.G.), a West German corporation with headquarters in Ludwigshafen, West Germany.

3. BASF A.G. manufactures and sells organic pigments and organic pigment formulations throughout the world.

4. BWC sells organic pigments and organic pigment formulations in the United States.

5. In its fiscal year ended December 31, 1977, BWC had total sales of approximately $786,000,000 of which domestic sales of organic pigments totaled approximately $8,000,000.

6. BWC is the thirteenth largest seller of organic pigments in the United States.

The Chemetron Pigments Division

7. Chemetron Corporation (Chemetron) is a corporation organized under the laws of the State of Delaware, with its principal place of business at 111 E. Wacker Drive, Chicago, Illinois.

8. Chemetron is a wholly-owned subsidiary of Allegheny Ludlum Industries (Allegheny), a corporation organized under the laws of the State of Pennsylvania, with its principal place of business at 2700 Two Oliver Plaza, Pittsburgh, Pennsylvania.

9. Prior to its acquisition by BWC, Chemetron's unincorporated Pigments Division (CPD) produced and sold organic pigments throughout the United States.

10. In its fiscal year ended January 1, 1978, CPD's sales of organic pigments were approximately $35,000,000.

11. CPD is the fourth largest seller of organic pigments in the United States.

Jurisdiction

12. At all times relevant herein BWC has been engaged in the sale of organic pigments in interstate commerce and the assets of CPD have been and are used in interstate commerce, and BWC and CPD are engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and the businesses of BWC and CPD are in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. [3]

The Acquisition

13. On or about November 18, 1978, BWC and Allegheny entered into a definitive agreement which provided, *inter alia,* for the acquisition by BWC of the assets of Chemetron's Pigment Division.

14. On or about March 23, 1979, BWC acquired the assets, business and property of CPD.

Trade and Commerce

15. The relevant line of commerce is the sale of organic pigments and submarkets thereof.

16. A relevant section of the country or geographic market is the continental United States.

17. The sale of organic pigments is concentrated, with the combined market share of the four largest sellers estimated to be approximately 52%.

18. Barriers to entry into the manufacture and sale of organic pigments are substantial.

Competition

19. Prior to the acquisition, BWC and CPD were and had been for many years actual competitors of each other in the organic pigments market and submarkets thereof and actual competitors of others in the organic pigments market and submarkets thereof throughout the United States.

20. In 1977, BWC accounted for approximately 2.0% of United States sales of organic pigments and CPD accounted for approximately 9.2% thereof.

21. BASF A.G. is a worldwide leader in the production and sale of organic pigments and had manifested a long standing interest in increasing its share of the U.S. organic pigments market.

Effects; Violation Charged

22. Due to various factors, including BASF A.G.'s worldwide sales and production position in organic pigments and its research and development capability, BWC's 2% share understates its competitive strength in the U.S. market.

23. The effects of the acquisition may be to substantially lessen competition or tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between BWC and CPD in the sale [4]of organic pigments and submarkets thereof will be eliminated;

(b) actual competition between competitors generally in the sale of organic pigments and submarkets thereof may be lessened;

(c) the likelihood of increased participation by BWC and BASF A.G. in the U.S. organic pigments market and submarkets thereof by alternative means will be eliminated;

(d) CPD will be eliminated as an actual substantial independent competitor in the sale of organic pigments and submarkets thereof;

(e) the combined operation will be ranked number three in the organic pigments market thus increasing concentration in the sale of organic pigments and diminishing possibilities for eventual deconcentration; and

(f) mergers or acquisitions between other organic pigment manufacturers may be fostered, thus causing a further substantial lessening of competition and tendency toward monopoly in the sale of organic pigments.

Initial Decision by

Montgomery K. Hyun, Administrative Law Judge

May 14, 1982

Preliminary Statement

By Complaint issued on April 5, 1979, the Federal Trade Commission ("FTC" or "Commission") charged BASF Wyandotte Corporation ("BWC"), a wholly-owned subsidiary of BASF Aktiengesellschaft ("BASF AG" or "BASF") with a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45(a)(1)), by virtue of its acquisition of the Pigments Division of Chemetron Corporation ("CPD") from Allegheny Ludlum Industries, Inc. on March 3, 1979. BWC filed its Answer on May 4, 1979 admitting in part and denying in part the various allegations of the Complaint.

The Complaint alleged that prior to the acquisition, BASF, which manufacturers and sells organic pigments throughout the world, sold organic pigments in the United States through its wholly-owned [2]subsidiary, BWC. (Complaint ¶ 1–6). The Complaint also alleged that CPD produced and sold organic pigments throughout the United States. (Complaint ¶ 7–11).

Organic pigments and submarkets thereof were alleged to be the relevant lines of commerce for the purpose of evaluating the competitive effects of the acquisition. (Complaint ¶ 15). Subsequent to the issuance of the Complaint, complaint counsel designated

phthalocyanine pigments as an appropriate submarket in which to analyze the effects of the acquisition. The Complaint further charged that the alleged organic pigments market was concentrated and that barriers to entry into the market were substantial. (Complaint ¶ 17–18).

The Complaint further alleged that prior to the acquisition, BWC and CPD had been actual competitors in the markets and that their shares of the organic pigments market were approximately 2% and 9.2%, respectively. (Complaint ¶ 19–20). It also alleged that BASF had manifested a long-standing interest in increasing its share of the United States organic pigment market. (Complaint ¶ 21–22).

The Complaint finally alleged that BWC's acquisition of CPD would tend to substantially lessen competition in the alleged markets in the following ways:

(a) actual competition between BWC and CPD in the sale of organic pigments and submarkets thereof will be eliminated;

(b) actual competition between competitors generally in the sale of organic pigments and submarkets thereof may be lessened;

(c) the likelihood of increased participation by BWC and BASF AG in the U.S. organic pigments market and submarkets thereof by alternative means will be eliminated;

(d) CPD will be eliminated as an actual substantial independent competitor in the sale of organic pigments and submarkets thereof;

(e) the combined operation will be ranked number three in the organic pigments market, thus increasing concentration in the sale of organic pigments and diminishing possibilities for eventual deconcentration; and [3]

(f) mergers or acquisitions between other organic pigment manufacturers may be fostered, thus causing a further substantial lessening of competition and tendency toward monopoly in the sale of organic pigments. (Complaint ¶ 23).

The parties conducted extensive discovery between themselves and non-party industry competitors prior to the trial of this matter. Complaint counsel conducted an industry-wide survey respecting the production and sale of organic pigments and phthalocyanine pigments for the years 1977–1979. Counsel for respondent subpoenaed profitability data from several organic pigments manufacturers.

The proceeding originally assigned for trial to Administrative Law Judge James P. Timony, April 6, 1979, was reassigned to Administrative Law Judge Paul Teetor on March 19, 1980, and upon Administrative Law Judge Teetor's retirement, to Administrative Law Judge Montgomery K. Hyun on February 19, 1981.

The trial of this matter began on March 30, 1981 in Chicago, Illinois. The case-in-chief was completed on May 1, 1981. The defense case was presented in New York, New York and began on or about June 1, 1981. Hearings continued on a regular basis through the beginning of September 1981. Rebuttal evidence was presented in Chicago during the last week of October and in New York in early December 1981. Surrebuttal was concluded on December 5, 1981. In all, testimony was taken from 46 witnesses, including 13 called by complaint counsel and 33 by counsel for respondent. The record consists of some 12 thousand pages of transcripts of testimony and several thousand pages of documentary exhibits.

The record was closed on December 18, 1981. By an Order dated January 18, 1982, the Commission extended the time for the filing of an initial decision to and including May 14, 1982. The following witnesses gave testimony in this proceeding:

Witnesses Called By Complaint Counsel

Heinz Geiss	Vice-President of Sales and Marketing, Industrial Chemicals Division American Hoechst Corporation (Tr. 2051–52)
David R. Kamerschen, Ph.D.	Distinguished Professor of Economics University of Georgia (CX 7001; Tr. 10,794) [4]
Alan E. Krause	Consumer Protection Specialist Federal Trade Commission (Tr. 931)
Jeffrey M. Lipton	Former Director, Colored Pigment Production Division E.I. Du Pont de Nemours & Co. (Tr. 1591–92)
William O. Nicoll	Vice President, former General Manager, Coatings, Specialty Products Hercules, Inc. (Tr. 10,657)
Sol Panush	Manager of Color, Plastics and Specialties Division Celanese Corporation (Tr. 2691–99)
Paul Papillo	Vice-President, Plastics and Additive Division CIBA-GEIGY Corporation (Tr. 1764–66)

Witnesses Called By Complaint Counsel

Erhard R. Schober	Director of Marketing, Pigments Division Mobay Chemical Corp. (formerly Harmon Colors Corp.) (Tr. 1637)
Hugh M. Smith, Ph.D.	Director of Research & Development, Pigments Division Sun Chemical Corporation (Tr. 1287)
Dr. Klaus Stammen	President Siegwerk, Inc. (Tr. 2376–77)
John Toogood, Ph.D.	General Manager, Colors Department Harshaw Chemical Company (Tr. 12,106)
Allan Weissglass	President Magruder Color Company, Inc. (Tr. 2481)
Harold C. Whittemore, Jr.	Senior Vice-President Sun Chemical Corporation (Tr. 1907–08) [5]

Witnesses Called By Respondent

Morris Adelman, Ph.D.	Professor of Economics Massachusetts Institute of Technology (RX 9015; Tr. 10,020–33)
Dr. Hans Albers	Director BASF AG (Tr. 6158)
Richard L. Alsager	Manager of Marketing Research BASF Wyandotte Corporation (Tr. 3508)
Eli M. Aschner	Tenneco, Inc. (former Marketing Manager, BWC) (Tr. 5333)
Theodore Bluey	Partner Deloitte, Haskins & Sells (Tr. 6325)
Dr. Gustav Bock	Director, Pigments & Auxiliaires Applied Technology Department Leader, Development Group BASF AG (Tr. 3389–91)
Roger Brinner, Ph.D.	Vice-President Data Resources, Inc. (Tr. 7662–77)

Witnesses Called By Respondent

James Canon, Ph.D.	Consultant of BWC, former Vice President of Harshaw Chemical (Tr. 12,581)
Jerome E. Counihan	Former President of CDP and Consultant, BASF Wyandotte Corporation (Tr. 5521)
Jerome Bruce Giniger	Vice-President Pope Chemical Corporation (Tr. 7205–06)
Michael L. Glassman	President Glassman-Oliver Economic Consultants, Inc. (RX 9003; Tr. 8340) [6]
Dr. Erwin Hahn	Director, Dyestuffs and Pigment Research Laboratory BASF AG (Tr. 3947–53)
Laurie Hiscock	Works Manager, Huntington Works BASF Wyandotte Corporation (Tr. 6012)
Kurt Kiesling	Works Manager, Holland Plant, BASF Wyandotte Corporation (Tr. 6078)
Dr. Josef F. Kohnle	Group Vice-President BASF Wyandotte Corporation (Tr. 4386–87)
Abraham Lindenhauer	Vice-President of Technical Services GAF Corporation (Tr. 7490)
Charles S. Long	Manager of Division Engineering BASF Wyandotte Corporation (Tr. 5795–96)
Paul Malchick, Ph.D.	General Manager, Chemetron Pigments Division BASF Wyandotte Corporation (Tr. 2813–28)
Jesse W. Markham, Ph.D.	Charles Edward Wilson Professor of Economics Harvard University (RX 9002; Tr. 7902–40)
Herbert A. McKenzie	President Hilton-Davis Chemical Group Sterling Drug, Inc. (Tr. 6736–37)

Witnesses Called By Respondent

Frank Edward McKulka	Manager of Economic Analysis and Planning BASF Wyandotte Corporation (Tr. 7532)
Dr. Rolf Mecke	Member Division of Economic Evaluation BASF AG (Tr. 4152–55)
Charles H. Mertz	Vice-President, Customer Service Group Applied Color Systems (Tr. 7054) [7]
Karl Muench	Director, Sparte CP BASF AG (Tr. 3770)
Michael Peter Parker	Manager, Dyestuffs and Intermediates, Organics Division ICI, Ltd. (Tr. 4936–38)
Walter Schmiedeskamp	Partner Deloitte, Haskins & Sells (Tr. 6967)
Michael Stavar	Accountant BWC (Tr. 7233)
Dr. Erich Stoeckl	Director, Pigment Production BASF AG (Tr. 5014–15)
Clayton A. Sweeney	Executive Vice-President and Chief Administrative Officer Allegheny International (Tr. 7370)
Harold Thiemer	Accountant BASF AG (Tr. 6736–37)
Peter Tschirch	Controller BASF AG (Tr. 5184)

The proposed findings of fact and conclusions of law submitted by the parties and their arguments in support thereof have been given careful consideration by the administrative law judge and to the extent not adopted by this Initial Decision, in the form proposed or in substance, are rejected as not supported by the evidence or as immaterial. Any motion appearing on the record not heretofore or hereby ruled upon either directly or by the necessary effect of the

findings and conclusions made in this Initial Decision are hereby denied.

Upon consideration of the entire record in this proceeding and having considered the demeanor of the witnesses, the administrative [8]law judge makes the following findings of fact and conclusions of law and order based on the record considered as a whole.[1][9]

Findings of Fact

I. The Identity of the Acquiring and the Acquired Firms

A. *BASF AG And Its Business*

1. The BASF Group is comprised of BASF Aktiengesellschaft (AG) and all companies which are at least 50% owned by BASF AG or its majority holdings. (RA 1; CX 51B).

2. BASF AG (hereinafter "BASF") is a West German corporation with headquarters in Ludwigshafen, the Federal Republic of Germany ("FRG" or "West Germany"). BASF is engaged in six lines of business:

> Basic Petrochemicals, including oil, gas, and petroleum products such as fuel oil, naphtha, and benzene;

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[1] The following abbreviations were used in this Initial Decision:

CB	Memorandum In Support of Complaint Counsel's Proposed Findings
RB	Respondent's Brief in Support of Proposed Findings
CPF	Complaint Counsel's Proposed Findings
RPF	Respondent's Proposed Findings
CX	Complaint Counsel's Exhibit
RX	Respondent's Exhibit
(Tr.)	Transcript Reference
(Name Number)	Testimony of the Named Witness at Listed Transcript Page Number
(CC's Admission, §)	Paragraph Number of Complaint Counsel's Responses to Respondent's Admissions
RA	Refers to Respondent's Responses to Complaint Counsel's Second Request for Admissions, dated February 23, 1981 and supplemented on March 30 and April 22, 1982 (No.)
Int. (I)	Refers to Respondent's Answers to Complaint Counsel's First Set of Interrogatories, dated December 24, 1979 and June 26, 1980 (No.)
Int. (II)	Refers to Respondent's Answers to Complaint Counsel's Second Set of Interrogatories, dated November 18, 1980, November 21, 1980 and December 3, 1980 (No.)
Stip.	Refers to Stipulation between Complaint Counsel and Respondent's Counsel (Date)

Agricultural Chemicals, including fertilizers, potash, salts, and crop protection products;

Plastics, including polyolefins, polystyrene, polyvinyl chloride, and specialty plastics;

Chemicals, including basic chemicals, industrial chemicals, intermediates, fine chemicals, and fiber raw chemicals;

Dyestuffs and Auxiliaries, including textile chemicals, pigments and non-textile auxiliaries, and dispersions; and

Consumer Products, including coatings and paints, magnetic recording media, nyloprint, and pharmaceuticals. (CX 51J).

3. The BASF Group manufactures and sells its products all over the world including the European Community, North America, West Europe excluding the European Community, Latin America, South and East Asia, Australia, East Europe, Africa, and West Asia. (CX 51X-Z). [10]

4. The BASF Group had the following net sales, earnings, and assets for the years 1971 through 1978:

million $[2]	1971	1972	1973	1974	1975	1976	1977	1978
Net Sales	2,944	3,720	5,384	7,642	7,364	8,338	[***]*	[***]
Net Income	[***]	[***]	[***]	[***]	[***]	[***]	[***]	[***]
Fixed Assets	1,934	2,183	2,625	2,772	3,026	3,084	[***]	[***]
Total Assets	3,309	3,926	4,944	5,668	6,069	6,170	[***]	[***]

(RA 3).

5. Approximately 11% of the BASF Group's net sales were made in North America. (*Compare* RA 5 *with* RA 3). In the years 1977 and 1978 respectively, [***] and [***] of the BASF Group's investments in tangible fixed assets were made in the United States. (RA 6). In 1978 alone, the BASF Group invested almost [***] million in tangible fixed assets in the United States. (RA 6).

6. The BASF Group sold the following quantities and value of organic pigments under the following tradenames in the years 1974–1978: [11]

[2] Deutschemarks converted to Dollars according to the following exchange rates listed in the Federal Reserve Bulletin:

1971	1972	1973	1974	1975	1976	1977	1978
28.768	31.364	37.758	38.723	40.729	39.737	43.079	49.867

Cents per Deutschemark. Because responses to interrogatories, requests to admit facts, and documents often provided value information in a foreign currency, complaint counsel converted the foreign currency to dollars. All conversions from Deutschemarks to Dollars were made according to the exchange rates listed above. The source of these rates, the Federal Reserve Bulletin, is the same source used for the Stipulation dated February 10, 1982.

* Throughout this document, reference to [* * *]indicates where *in camera* material has been excised.

Tradename	1974	1975	1976	1977	1978
Heliogen[3]					
Metric Tons	5,471.1	3,287.0	4,918.2	[***]	[***]
Million $	39.7	27.3	38.7	[***]	[***]
Fanal					
Metric Tons	620.7	322.9	533.6	[***]	[***]
Million $	7.8	4.3	6.8	[***]	[***]
Lithol					
Metric Tons	1,580.1	1,393.2	1,498.7	[***]	[***]
Million $	8.7	8.7	9.2	[***]	[***]
Paliogen					
Metric Tons	243.9	139.8	210.5	[***]	[***]
Million $	8.0	4.8	8.1	[***]	[***]
Paliotol					
Metric Tons	228.7	94.0	127.4	[***]	[***]
Million $	3.5	1.4	2.1	[***]	[***]
Sico					
Metric Tons	1,056.9	632.4	801.6	[***]	[***]
Million $	9.2	6.4	8.0	[***]	[***]
Others					
Metric Tons	247.6	164.4	189.3	[***]	[***]
Million $	1.2	1.0	1.1	[***]	[***]
Total Worldwide[4]					
Metric Tons	9,449	6,033.7	8,279.3	[***]	[***]
Million $	78.1	53.8	74.0	[***]	[***]

(RA 22; 24). [12]

7. Until August 1, 1980, BASF was organized according to a divisional principle. (Int. (I) 16). There were ten "Ressorts" which had the following organization codes and titles:

Code	Title
A	Units reporting directly to the chairman
G	Basic Chemicals, Oil and Gas, Agrichemicals
K	Plastics
C	Dyestuffs, Chemicals, Dispersions
V	Consumer Products, Sales Coordination, Distribution
U	Overseas Operations
T	Engineering
W	Research and Development
F	Finance
P	Human Resources

Each "Ressorts" consisted of several "Sparten"—either "Product-

[3] Quantity and value for the Heliogen tradename includes sales of phthalocyanine pigments in the United States under the tradename Paliofast. *See* RA 131; 134–35.

[4] Differences between the total worldwide figures and the sum of the amounts for each tradename by year are the result of rounding errors in conversion from DM to $ and inconsistencies between BWC's responses to RA 22 and RA 24.

Sparten" or "Regional-Sparten." "Product-Sparten" were responsible for sales in Europe and had worldwide chemical/technical responsibilities for the products they handle. "Regional-Sparten" were responsible for sales in their geographical regions outside Europe. (Int. (I) 16). Each of the "Sparten" were further subdivided into divisions, departments, and subdepartments which had progressively narrower areas of responsibility and specialization. *See* RA 7; 9–11; 13–19; 34; 37–40.

8. Until December 31, 1977, Ressort C (dyestuffs, chemicals, dispersions) was organized into four "Product-Sparten" which had the following organization codes and titles:

Code	Title
CF	Dyestuffs and Auxiliaries
CI	Industrial Chemicals
CZ	Intermediates
CD	Dispersions

(RA 9; Int. (I) 20). Sparte Dyestuffs and Auxiliaries ("CF") was responsible for the management of BASF's dyestuffs, pigments, and auxiliaries business. (RA 10). Sparte CF was subdivided into several departments, as follows: [13]

Code	Title
CFOS	Staff
CFA	Dyestuff (Production) Division I
CFB	Dyestuff (Production) Division II
CFH	Auxiliaries Division
CFV	Sales - Dyestuffs and Auxiliaries
CFE	Technical Services Department - Dyestuffs and Auxiliaries

(RA 11).

9. In 1970, BASF acquired G. Siegle and Co., GmBH, a manufacturer of organic and inorganic pigments. Until December 31, 1977, Sparte VS (Special Colors) was responsible for the management of the Siegle pigments business. (RA 12; Int. (I) 20).

10. On January 1, 1978, as a result of a reorganization of Ressorts C and V, Sparte Pigments and Auxiliaries ("CP") and Sparte Textile Dyes and Chemicals ("CT") were formed and Sparte CF and Sparte VS were abolished. (RA 12; Int. (I) 20). Thereafter, Sparte CP became responsible for the pigments business previously managed by Sparte VS and for the pigments, pigments dispersions, and non-textile dyestuffs and auxiliaries products previously managed by Sparte CF.

Sparte CT became responsible for the dyestuffs and auxiliaries used for the textile industry. (RA 12; Int. (I) 20).

11. From January 1, 1978 until August 1, 1980, Sparte CP (Pigments and Auxiliaries) was organized into six departments, as follows:

Code	Title
CPOS	Staff
CPP	Pigment Production Division
CPH	Auxiliaries Production Division
CPV	Sales - Pigments and Auxiliaries
CPE	Technical Services Department - Pigments and Auxiliaries
CPOZ	Central Development [14]

(RA 14). Sparte CP also had collateral responsibility over the "U.B. Pigmente" division (formerly the Siegle pigments business) of BASF Farben and Fasern, AG. (RA 12; 14; Int. (I) 20). The "U.B. Pigmente" business (SP) was organized as follows:

Code	Title
ST	Technology
STA	Technical Services Department
SV	Sales

(RA 14).

12. During the period 1971–1979, Sparte CP (and its predecessor Sparte CF) had the following responsibilities respecting BASF's United States organic pigments business: short, middle, and long-range strategic and operations planning; marketing and sales development; production, export planning (in conjunction with Sparte UN); and production technology. (RA 13; Int. (I) 16).

13. Until August 1, 1980, Ressort U (Overseas Operations) was organized into four Sparten, one of which was Sparte UN (North America). (RA 37). Sparte UN was subdivided into three departments, as follows:

Code	Title
UNV	Sales
UNT	Technical Coordination
UNOK	Profit Control

(RA 38).

14. As of March 1979, Sparte UN had the following responsibilities respecting BASF's sale of organic pigments in the United States:

responsibility for the combined results of all United States subsidiaries; planning of exports from Europe (jointly with Sparte CP); handling of exports to BWC; coordination of technology transfer between Sparte CP and BWC; coordination in setting up strategies and plans; and planning and coordination of all major capital investments in tangible fixed assets to be made in the United States (in conjunction with Sparte CP). (Int. (I) 16; RA 39–40). [15]

15. The names and positions of some officers and employees of BASF and BWC are summarized hereinbelow as an aid to understanding the documentary and testimonial evidence in this proceeding.

Dr. Bernhard Timm: From 1971 to February 1981, he held the following positions:

Dates	Position
7/2/74 - present	Chairman, Supervisory Board of BASF
1971 - 7/2/74	Chairman, "Vorstand" (Board of Executive Directors) of BASF AG
1971 - 4/8/74	Member, Board of Directors, BASF Wyandotte Corporation

(RA 41).

Dr. Mathias Seefelder: From 1974 to February 1981, he held the following positions:

Dates	Position
7/2/74 - present	Chairman, "Vorstand" of BASF AG
4/8/74 - 11/15/80	Member, Board of Directors, BWC

(RA 42).

Dr. Hans Albers: From 1971 to February 1981, he held the following positions: [16]

Dates	Position	Code[5]
7/2/74 - 7/31/80	Director, Ressort Dyestuffs, Chemicals Dispersions, BASF AG	C
1/1/74 - present	Member, "Vorstand" of BASF AG	
4/25/78 - present	Member, Board of Directors of BWC	
11/1/71 - 7/1/74	General Manager, Sparte Dyestuffs and Auxiliaries, BASF AG	CF

(RA 43).

Dr. Otto Christmann: From July 1974 to August 1, 1980, he held the following positions:

Dates	Position	Code
1/1/78 - 8/1/80	General Manager, Sparte Textile Dyes and Chemicals, BASF AG	CT
7/2/74 - 12/31/77	General Manager, Sparte Dyestuffs and Auxiliaries, BASF AG	CF

(RA 44).

Karl Muench: From 1971 to August 1, 1980, he held the following positions: [17]

Dates	Position	Code
1/1/78 - 8/1/80	General Manager, Sparte Pigments and Auxiliaries, BASF AG	CP
1971 - 12/31/77	Director, Sales Department, Sparte Dyestuffs and Auxiliaries, BASF AG	CFV

(RA 45).

Bernard Hardekopf: From January 1, 1978 to August 1, 1980, he held the position of Director, Sales Department, Sparte Pigments and Auxiliaries, BASF A.G. (CPV). (RA 46).

Werner Scheuer: From 1971 to August 1, 1980, he held the following positions:

[5] An understanding of BASF's system of organization codes is helpful because the authors and recipients of BASF's documents are generally indicated by organization code only.

Dates	Position	Code
1/1/78 - 8/1/80	Deputy Director, Pigments and Soluble Dyes, Sales Department Sparte Pigments and Auxiliaries, BASF AG	CPV/P
1971 - 12/31/77	Deputy Director, Sales Department, Sparte Dyestuffs and Auxiliaries, BASF AG	CFV/P

(RA 47).

Dr. Erich Stoeckl: From April 1, 1967 to August 1, 1980, he held the following positions:

Dates	Position	Code
1/1/78 - 8/1/80	Director, Pigments Department, Sparte Pigments and Auxiliaries, BASF AG	CPP
[18] 4/1/67 - 1/1/78	Director, Dyes Department, Sparte Dyestuffs and Auxiliaries, BASF AG	CFA

While holding both of these positions, Dr. Stoeckl was responsible for BASF's production of organic pigments. (RA 48).

Dr. Schrodel: From 1971 to June 12, 1979, he held the following positions:

Dates	Position	Code
1/1/78 - 6/12/79	Deputy Director, Tricolor Factory, Pigments Department, Sparte Pigments and Auxiliaries, BASF AG	CPP/T
1971 - 12/31/77	Deputy Director, Tricolor Factory, Dyes Department, Sparte Dyestuffs and Auxiliaries, BASF AG	CFA/T

(RA 49).

Dr. Brunkhorst: From 1971 to August 1, 1980, he held the following positions:

Dates	Position	Code
1/1/78 - 8/1/80	Deputy Director, Azo Factory, Pigments Department, Sparte Pigments and Auxiliaries, BASF AG	CPP/A
[19] 1971 - 12/31/77	Deputy Director, Azo Factory, Dyes Department, Sparte Dyestuffs and Auxiliaries, BASF AG	CFA/A

(RA 50).

Dr. Trauth: From 1971 to August 1, 1980, he held the following positions:

Dates	Position	Code
1/1/78 - 8/1/80	Deputy Director, Finish Factory, Pigments Department, Sparte Pigments and Auxiliaries, BASF AG	CPP/F
1971 - 12/31/77	Deputy Director, Finish Factory, Dyes Department, Sparte Dyestuffs and Auxiliaries, BASF AG	CFA/F

(RA 51).

Dr. Polster: From 1971 to August 1, 1980, he held the following positions:

Dates	Position	Code
1/1/78 - 8/1/80	Deputy Director, Pigments Development Laboratory, Pigments Department, Sparte Pigments and Auxiliaries, BASF AG	CPP/P
1971 - 12/31/77	Deputy Director, Development Laboratory, Dyes Department, Sparte Dyestuffs and Auxiliaries, BASF AG	CFA/P

(RA 52). [20]

Dr. Norbert Gotz: From 1971 to August 1, 1980, he held the following positions:

Dates	Position	Code
1/1/78 - 8/1/80	Director, Technical Services Department, Sparte Pigments and Auxiliaries, BASF AG	CPE
1971 - 12/31/77	Director, Technical Services Department, Sparte Dyestuffs and Auxiliaries, BASF AG	CFE

(RA 53; 16).

Dr. Walter Puff: From 1971 to August 1, 1980, he held the following positions:

Dates	Position	Code
1/1/78 - 8/1/80	Deputy Director, Technical Services - "Sonder F" Subdepartment, Sparte Pigments and Auxiliaries, BASF AG	CPE/SF
1971 - 12/31/77	Deputy Director, Technical Services - "Sonder F" Subdepartment, Sparte Dyestuffs and Auxiliaries, BASF AG	CFE/SF

(RA 54). The Technical Services - "Sonder F" Subdepartment of Sparte CP was responsible, *inter alia,* for providing technical assistance and advice to purchasers of BASF's organic pigments through its Market Service Groups. (RA 17–18). **[21]**

Dr. Gustav Bock: From 1971 to August 1, 1980, he held the following positions:

Dates	Position	Code
1/1/78 - 8/1/80	Leader, Development Group, Technical Services - "Sonder F" Subdepartment, Sparte Pigments and Auxiliaries, BASF AG	CPE/SF1
1971 - 12/31/77	Leader, Development Group, Technical Services - "Sonder F" Subdepartment, Sparte Dyestuffs and Auxiliaries, BASF AG	CFE/SF1

(RA 55).

16. The Development Group of the Technical Services - "Sonder F" Subdepartment of Sparte CP was responsible, *inter alia,* for forwarding requests for development of new or improved organic pigments to the research laboratories or the production site laboratories; checking and testing new or improved products that came from the research laboratories or the production site laboratories; designating new or improved products as so-called "E" (developmental or experimental) products; sampling "E" products to selected customers for testing purposes; and participating in the decision to upgrade the status of an "E" pigment to a so-called "SF" (test product) pigment. As of January 1, 1979, when a product was upgraded from an experimental pigment ("E") to a test product ("SF"), the "Market Opening Pigments and Dyestuffs" group (organization code CPE/SF 3) assumed responsibility for the introduction of the product to interested customers. Prior to the formation of the "Market Opening" group, this responsibility was assumed by the appropriate market service group within the Technical Services - "Sonder F" Subdepartment that served the industry in which the "SF" product was to be used. (RA 21; Puff dep. CX 5094E–F). [22]

Dr. M. Minsinger: From 1975 to August 1, 1980, he was the General Manager, Sparte North America, BASF AG (code UN). As of May 11, 1976, he was also a member of BWC's Board of Directors. (RA 59).

Dr. von Selchow: From 1971 to August 1, 1980, he was the Director, Sales Department, Sparte North America, BASF AG (code UNV). (RA 60).

Gerd Meyer: From 1971 to August 1, 1980, he was the Prokurist-Marketing, Sales Department, Sparte North America, BASF AG (code UNV/M). (RA 61).

Peter Tschirch: From 1977 to August 1, 1980, he was the Prokurist, Profit Control, Sparte North America, BASF AG (code UNOK). (RA 63).

Dr. von Pigenot: From 1973 to August 1, 1980, he was a Member, Technical Coordination - Dyes, Pigments and Auxiliaries, Sparte North Amercia, BASF AG (code UNT). (RA 64).

17. "Commission F" of BASF AG is responsible for reviewing possible acquisitions by BASF and recommending approval or disapproval of the acquisition to BASF's Board of Directors ("Vorstand"). (RA 36).

18. "Commission S" of BASF AG is responsible for reviewing proposed fixed asset investment plans and recommending approval or disapproval of the capital investment plan to BASF's Vorstand. (Muench 3777–78).

B. *BASF Wyandotte Corporation (BWC) And Its Business*

19. BASF Wyandotte Corporation ("BWC") is a corporation organized under the laws of the State of Michigan, with its principal place of business at 100 Cherry Hill Road, Parsippany, New Jersey. (Comp. 1; Ans. 1).

20. BWC was formed in 1971 as the result of a merger of BASF Corporation, a BASF AG subsidiary conducting business in the United States, into Wyandotte Chemicals Corporation, which BASF AG had acquired in 1969. (RA 65–67). [23]

21. As of March 1979, BWC was a wholly-owned subsidiary of BASF America Corporation, a wholly-owned subsidiary of BASF AG. (Comp. 2; Ans. 2; RA 68).

22. As of January 1, 1979, BWC engaged in four main lines of business:

> Industrial Chemicals, including both organic and inorganic chemicals;
>
> Colors and Intermediates, including organic and inorganic pigments, dyestuffs, auxiliaries, agricultural chemicals, plasticizers, and organic intermediates;
>
> Polymers, including urethane and expandable polystyrene; and
>
> Chemical Specialties, including industrial specialties, chemical process specialties, cleaning and sanitizing products, printing plates and equipment, and magnetic recording media.

(RA 71; 73).

23. As of January 1, 1978, BWC maintained the following plants and production sites in the United States:

> Bedford, Massachusetts
> Magnetic recording media
>
> Carlstadt, New Jersey
> Leather finishes and protective paints
>
> Charlotte, North Carolina
> Textile and other auxiliaries, leather
> tanning chemicals and dyestuff laboratories
>
> East Stroudsburg, Pennsylvania
> Cleaning and sanitizing products [24]
>
> Geismar, Louisiana
> Chlorine, caustic soda, ethylene oxide,

ethylene glycol, toluene diisocyanate, polyether polyols, butanediol

Greenville, Mississippi
Agricultural testing station

Jamesburg, New Jersey
Expandable polystyrene

Kearny, New Jersey
Expandable polystyrene

Parsippany, New Jersey
Administration

Port Edwards, Wisconsin
Chlorine, caustic soda

Santa Fe Springs, California
Cleaning and sanitizing products

Troy, Michigan
Urethane systems

Tucker, Georgia
Cleaning and sanitizing products

Washington, New Jersey
Polyether polyols

Wyandotte, Michigan
Chlorine, caustic soda, sodium bicarbonate, propylene oxide, polyether polyols, surfactants, cleaning and sanitizing products, transparent iron oxide pigments.

(RA 72).

24. BWC's butanediol (an intermediate for the production of plastics) plant located at Geismar, Louisiana, was put into operation in 1977. (RA 148). In 1978, BWC completed the construction of a Basagran herbicides plant at Geismar. (RA 149). Also in 1978, BWC [25]put into operation a plant for the manufacture of Vitamin E at Wyandotte, Michigan. (RA 150). On November 5, 1979, BWC began construction of a plant for the manufacture of diphenyl methane diisocyanate (MDI) at Geismar. (RA 152).

25. BWC had the following sales, earnings, assets, and capital expenditures for the years 1971–1977:

Million $	1971	1972	1973	1974	1975	1976	1977
Net Sales	268.8	315.4	378.3	517.4	589.8	710.0	
Earnings After Taxes	[***]	[***]	[***]	[***]	[***]	[***]	
Total Assets	254.8	281.4	300.3	354.6	437.1	530.6	
Fixed Assets	147.6	157.6	169.2	187.7	224.1	270.5	
Capital Expenditures	22.9	27.4	30.6	42.0	53.7	76.8	

(RA 70).

26. As of March 1979, BWC was organized into four groups: Industrial Chemicals Group, Colors and Intermediates Group, Polymers Group, and Chemicals Specialties Group. These four basic groups were further subdivided into divisions and departments, each with a progressively narrower scope of responsibility. (RA 73–74; 76–78).

27. BWC's Colors and Intermediates Group (formerly the Colors and Chemicals Group) consisted of three divisions, one of which was the Colors and Auxiliaries Divsion. (RA 74). The Colors and Auxiliaries Division was responsible for organic pigments, inorganic pigments, dyestuffs, and auxiliaries (RA 76), and was structured into six departments: Manufacturing, TCC (Textile Colors and Chemicals) Marketing, PIC (Pigments and Industrial Colors) Marketing, Whitestone Operations, Leather and Paper Dyes Marketing, and Business Strategies. (RA 77).

28. The PIC Department was responsible for organic pigments, inorganic pigments and dyes for all non-textile applications except leather and paper applications. (RA 78). It was headed by a Marketing Manager, who was responsible for the Sales Manager and **[26]**Technical Service Manager. (RA 79). The Sales Manager was directly responsible for the PIC sales force (RA 80); the Technical Service Manager was directly responsible for the PIC Department's technical service force. (RA 81). As of January 1978, the position of Technical Service Manager was abolished and the Sales Manager assumed responsibility for two newly created Industry Managers, one of whom handled printing inks customers and the other paints and coatings customers. Each of the industry managers assumed responsibility for both technical service and sales to their respective industry. (RA 82).

29. The names and positions of certain officers and employees of BASF/BWC for the relevant period are given hereinbelow:

Dieter Ambros: From April 20, 1971 to April 10, 1979, he was the President of BWC. During the same time period, he was a member of BWC's Board of Directors. (RA 83).

Dr. J.F. Kohnle: From 1970 to February 1981, he held the following positions with BWC and BASF:

Dates	Position	Code
10/79 - present[6]	Group Vice-President, Colors and Fine Chemicals Group, BWC	
1/1/76 - 10/79	Group Vice-President Colors and Intermediates Group, BWC	
10/1/72 - 11/3/75	Director, Strategic Planning and Five Year Planning, Zentralbereich Zentrale Planung, BASF AG	AZS
[27] 7/1/70 - 10/1/72	Group Leader, Strategic Planning, Zentralbereich Zentrale Planung, BASF AG	AZS

(RA 84).

James G. Brown: From November 1973 to March 1977, he was the General Manager, Colors and Auxiliaries Division, BWC. (RA 85). He was succeeded by Gunter Koenen. (RA 86).

Dr. Edwin Hahn: From 1968 to February 1981, he has held the following positions with BWC and BASF:

Dates	Position	Code
6/13/79 - present	General Manager, Dyestuff Laboratory BASF AG	WF
1/1/78 - 6/12/79	Director, Central Development, Sparte Pigments and Auxiliaries, BASF AG	CPOZ
3/1/74 - 12/31/77	Director, Central Development, Sparte Dyestuffs and Auxiliaries, BASF AG	CFE/ZE
1/70 - 1/74	General Manager, Colors and Auxiliaries Division, BWC	
1968 - 1/70	Director of Technical Relations, BASF Corporation	

(RA 87).

Dr. Uwe Soenksen: From 1971 to July 1979, he held the following positions at BWC and BASF: **[28]**

[6] In October 1979, BWC's Colors and Intermediates Group was reorganized and renamed the Colors and Fine Chemicals Group. As part of the reorganization, a new Pigments Division was created by combining the former Chemetron Pigments Division and the former PIC Department. (RA 75).

Dates	Position	Code
5/78 - 7/79	Venture Manager, Colors and Auxiliaries Division, BWC	
9/77 - 5/78	Manufacturing Manager, Colors and Auxiliaries Division, BWC	
2/74 - 9/77	Manufacturing Manager, Dyestuffs, Colors and Auxiliaries Division, BWC	
1971 - 2/74	Technical Coordination, Sparte North America BASF AG	UNT

(RA 88).

Dr. J. Dayan: From July 1974 to February 1981, he held the following positions:

Dates	Position
5/78 - present	Manufacturing Manager, Colors and Auxiliaries Division, BWC
9/77 - 5/78	Director, Group Technology, Colors and Intermediates Group, BWC
7/74 - 9/77	Assistant to General Manager/Manager, Planning and Administration, Colors and Intermediates Group, BWC

(RA 89). [29]

Ted Smock: From 1971 to March 1978, he held the following positions:

Dates	Position
1971 - 9/76	Marketing Manager, PIC Department, BWC
9/76 - 3/78	Director, National Pigments Accounts, PIC Department, BWC

(RA 90).

Eli Aschner: From September 1976 to January 1980, he was the Marketing Manager, PIC Department, BWC. (RA 91).

J. O'Grady: From 1965 to 1977, he was the Sales Manager, PIC Department, BWC. (RA 92).

Gunter Kirchmer: From 1971 to August 1, 1980, he held the following positions at BWC and BASF:

Dates	Position	Code
1/1/79 - 8/1/80	Leader, Market Opening Group, Pigments and Dyestuffs, Technical Services - "Sonder F" Subdepartment, Sparte Pigments and Auxiliaries, BASF AG	CPE/SF3
1/1/78 - 12/31/78	Market Service - Paints, Technical Services - "Sonder F" Subdepartment, Sparte Pigments and Auxiliaries, BASF AG	CPE/SF4
[30] 6/75 - 1/1/78	Market Service - Paints, Technical Services - "Sonder F" Subdepartment, Sparte Dyestuffs and Auxiliaries, BASF AG	CFE/SF4
1971 - 6/75	Technical Service Manager, PIC Department, BWC	

(RA 93).

Horst Bender: From 1970 to January 1978, he held the following positions at BWC and BASF:

Dates	Position	Code
1/1/77 - 3/1/78	Sales Manager, PIC Department, BWC	
8/1/75 - 8/1/77	Technical Service Manager, PIC Department, BWC	
1/1/72 - 8/1/75	Senior Technical Advisor, Printing Inks, PIC Department, BWC	
1/1/70 - 12/31/72	Market Service - Printing Inks, Technical Service - "Sonder F" Subdepartment, Sparte Dyestuffs and Auxiliaries, BASF AG	CFE/SF3

(RA 94).

C. *Chemetron Pigments Division ("CPD") And Its Business*

30. Chemetron Corporation was a corporation organized under the laws of the State of Delaware, with its principal place of business [31]located at 111 E. Wacker Drive, Chicago, Illinois. (Comp. 7; Ans.

7). It was a wholly-owned subsidiary of Allegheny Ludlum Industries, Inc. (presently, Allegheny International), a corporation organized under the laws of the State of Pennsylvania, with its principal place of business at 2700 Two Oliver Plaza, Pittsburgh, Pennsylvania. (Comp. 8; Ans. 8).

31. Prior to its acquisition by BWC, the Chemetron Pigments Division ("CPD") was an unincorporated division of Chemetron Corporation engaged in the manufacture and sale of organic pigments throughout the United States. (Comp. 9; Ans. 9)

32. Prior to 1964, Chemetron Corporation conducted its organic pigments business through Holland Color and Chemical Company of Holland, Michigan. (RA 112). In 1964, Chemetron Corporation acquired Standard Ultramarine and Color Co. of Huntington, West Virginia, and combined it with Holland Color and Chemical to form the Holland-Suco Color Co. as a subsidiary. (RA 113). In 1968, the Holland-Suco Color Co. was renamed the Pigments Division, Chemetron Corporation. (RA 114).

33. At the time of the acquisition, CPD manufactured organic pigments at two locations in the United States: Holland, Michigan and Huntington, West Virginia. (RA 110–11; CX 1907Q).

34. The name and positions of certain CPD officers and employees during the relevant period are given hereinbelow:

Jerome E. Counihan: From December 1973 to March 1979, he was the President of CPD. (RA 95).

W. R. Wickline: From November 1974 to March 1979, he held the following positions:

Dates	Position
5/77 - 3/79	Vice President, Marketing and Sales, CPD
3/76 - 5/77	Director, Marketing and Sales, CPD
11/74 - 3/76	General Sales Manager, CPD [32]

(RA 97). As Vice-President - Marketing and Sales, Mr. Wickline was responsible for the Marketing Research, Marketing, and Sales Departments of CPD. (RA 98; CX 2005F).

Richard L. Alsager: From December 1974 to March 1979, he was CPD's Marketing Research Manager. (RA 101).

P.E. Malik: From December 1976 to March 1979, he was a Marketing Research Analyst for CPD and reported to Mr. Alsager. (RA 102; CX 2005G).

T.W. Rogers: As of June 1978, he was Manager of CPD's Sales

Department which included three regional sales managers, 14 salesmen and one sales trainee. (RA 104; CX 2005I).

A.A. Egloff: As of March 1979, he was Manager of CPD's Marketing Department which included, *inter alia,* one technical service representative for solvent inks and another for coatings. (RA 103; CX 2005H).

Dr. S.P. Malchick: From October 1973 to March 1979, he held the following positions with CPD:

Dates	Position
10/73 - 2/77	Director of Research
2/77 - 3/79	Director of Technology

(RA 105). As the Director of Technology, Dr. Malchick was responsible for four departments: Research - Pigments and Chemicals; Research - Dispersions and Vehicles; Technical Service - Graphic Arts; and Technical Service - Coatings and Plastics. (RA 106; CX 2005Q-R, Y, EE, FF). The Research - Pigments and Chemicals Department consisted of the following research groups: azo reds; analytical services; pigments and intermediates process; phthalos; azo yellows; and high performance pigments. (RA 107).

Charles S. Long: From July 1975 to March 1979, he was CPD's Director of Engineering. (RA 109). **[33]**

D. *The Acquisition And Its Background*

35. In 1978, Allegheny Ludlum Industries (ALI) attempted to sell the assets of CPD to Rhinechem Corporation ("Rhinechem"), a subsidiary of Bayer AG ("Bayer"), a West German corporation. (CC's Factual Admissions, ¶ 44). A written agreement concerning the proposed sale of CPD to Rhinechem was entered into by ALI and Rhinechem on August 25, 1978. (BWC's Factual Admissions, ¶ 124). Among the unsuccessful bidders were BASF/BWC, Dainippon, and Sandoz. (Sweeney 7331–32). Upon application by the Federal Trade Commission, the United States District Court for the Northern District of Illinois, on October 20, 1978, issued an order preliminarily enjoining that sale and acquisition. (CC's Factual Admissions, ¶ 45). *See FTC v. Rhinechem Corporation,* 459 F. Supp. 785 (N.D. Ill. 1978).

36. In one of the proposed findings in support of the requested injunction submitted by the Commission's Chicago Regional Office to the District Court in the *Rhinechem* proceeding, it was stated that BWC would be among the more acceptable purchasers of CPD than Rhinechem. (Sweeney 7374–75).

37. Mr. Clayton A. Sweeney, then Senior Vice-President of ALI, met with complaint counsel after the injunction against the Rhinechem sale had been entered and described the nature of the three

serious potential purchasers in the bidding for CPD. (Sweeney 7380). Mr. Sweeney met again with complaint counsel before he signed a tentative agreement with BWC in November 1978. (Sweeney 7380–84).

38. Mr. Sweeney testified that he knew that complaint counsel had recommended to the Commission that a preliminary injunction application be authorized with respect to BWC's acquisition of CPD. On March 19, 1979, there was a meeting among Mr. Sweeney of ALI, complaint counsel and certain Federal Trade Commissioners and some of their staff. (Sweeney 7387–88). Subsequently, the Commission did not authorize an application for preliminary injunction against the acquisition. (Sweeney 7388–89).

39. On November 17, 1978, ALI, Chemetron Corporation, and BWC executed a purchase agreement. (RA 127). The acquisition of CPD by BWC was consummated on March 23, 1979. (RA 128). On April 5, 1979, an administrative complaint was issued in this proceeding. [34]

II. THE PRODUCT MARKET

A. *Colorants—Organic Pigments, Inorganic Pigments, And Dyes*

40. Colorants (agents used to impart color to materials) are generally classified into three groups: organic pigments, inorganic pigments and dyes. (CX 3102B, E; Malchick 2875–76). Organic pigments provide much of the color in printing inks, coatings (which include automotive paints, house paints and industrial paints), and plastics. Smaller areas of consumption include textiles and paper. (Schober 1646; Papillo 1785; Whittemore 1926; Malchick 2876). Dyestuffs and inorganic pigments are also used to impart color in various applications. (Smith 1301–04, 1348–49; Malchick 2875–76).

41. Pigments are particulate solids which are used as colorants. Organic pigments are carbon compounds. Inorganic pigments are not carbon compounds. Pigments are usually incorporated or dispersed in a vehicle or substrate for application to the material to be colored. A pigment is normally insoluble in the vehicle or substrate and remains a solid particle throughout the coloration process. (CX 1951F; 2047G; 3102A–C; 3987A; Smith 1321–22, 1585–86). The raw materials used to produce organic pigments are different from those used to produce inorganic pigments. Organic pigments are derivatives of petroleum or coal tar. (CX 2042W; 3101M; Smith 1467, 1585–86; Papillo 1802–03).

42. Dyes are organic chemicals. Unlike pigments, however, dyes are soluble compounds for which fibers have an affinity. (CX 1903B;

1951F; Smith 1304). Because of their different physical and chemical characteristics, pigments and dyes are applied differently in the coloration process. (CX 1951F; 3102C).

43. Organic pigments are classified by the ITC as "lakes" or "toners." (CX 16G; 3102N). A lake is an organic pigment which has been combined with an inorganic material (such as light alumina hydrate). A toner does not contain any inorganic material. (Smith 1314–15A). Historically, more organic pigments used to be sold in lake form than today. In 1978, organic pigment lakes represented less than 2% of total organic pigment production reported to the ITC. (CX 3987E).

44. Organic pigments may be divided into different classes on the basis of their chemistry as follows: azo pigments, condensation pigments, vat pigments, and polycyclic pigments. (Smith 1306–07). *See* CX 3102R. Azo pigments cover a wide variety of colors and pigment types. (Smith 1328, 1359). Polycyclic pigments include carbazole violets, flavanthrone yellows, indanthrone blues, phthalocyanines and quinacridones. (Smith 1354). Organic pigments may also be grouped by their color or shade. (Glassman 8465, 8475). **[35]**

45. The *Colour Index,* a standard reference book used by the pigments industry, categorizes and lists pigments according to their shade and chemical type. Each pigment is defined by a *Colour Index* name ("C.I. name") and a *Colour Index* chemical constitution number ("C.I. number"). (CX 3102D; Smith 1304, 1306). A *Colour Index* name is often variously abbreviated (*e.g.,* Pigment Blue 15 as P.B. 15, Blue 15, or B–15). (CX 1801K–O; 3102W).

46. Some of the families of organic pigments and their corresponding *Colour Index* designations are as follows (CX 3101D–F is the basic source; additional sources are noted):

Pigment Name	C.I. Name
Alkali Blue (CX 779F)	Pigment Blue 19 or 61
Anthrapyrimidine (CX 1702F)	Pigment Yellow 108
Azomethines	Pigment Yellow 129
Benzimidazolones	Pigment Yellow 120 Pigment Red 175, 176, 183, 185, 208 Pigment Violet 32 Pigment Brown 25
BON Maroon	Pigment Red 63
BON Reds (CX 16K)	Pigment Red 52 (calcium) Pigment Red 52:2 (manganese)
Carbazole Violet	Pigment Violet 23

Pigment Name	C.I. Name
Diarylide Yellows & Oranges	Pigment Yellow 12, 13, 14, 15, 16, 17, 55, 83 Pigment Orange 14, 15, 16
Dinitraniline Orange	Pigment Orange 5
Disazo Condensations	Pigment Yellow 93, 94, 95 Pigment Orange 31 Pigment Red 144, 166 Pigment Brown 23
Flavanthrone Yellow	Pigment Yellow 112 [36]
Hansa Yellows	Pigment Yellow 1, 3, 4, 5, 10, 60, 73, 74, 75, 78, 85, 97 Pigment Orange 1
Indanthrone Blues	Pigment Blue 21 and 22
Isoindoline (CX 1702H)	Pigment Yellow 139
Isoindolinones	Pigment Yellow 109, 110 Pigment Red 180
Lithol Reds (CX 16K)	Pigment Red 49 (sodium) Pigment Red 49:1 (barium) Pigment Red 49:2 (calcium)
Lithol Rubines (CX 1702B)	Pigment Red 57 or 57:1
Naphthol Reds (CX 3102W)	Pigment Red 17, 22, 23
Methyl Violet (CX 779D)	Pigment Violet 3
Nickel Azo Yellow	Pigment Green 10
Para Red	Pigment 1
(Permanent) Red 2B	Pigment Red 48:1 (barium)
(CX 16K; 3102X)	Pigment Red 48:2 (calcium)
Perylenes	Pigment Red 123, 149, 179, 190
Pigment Scarlet	Pigment Red 60
PhthalocyanineBlues (CX 16L; 1702H)	Pigment Blue 15, 15:1, 15:2, 15:3, 15:4, 16
PhthalocyanineGreens	Pigment Green 7, 36
Pyrazolones	Pigment Yellow 10 Pigment Orange 13, 34 Pigment Red 37, 38, 41, 42
Quinacridones	Pigment Orange 47, 48, 49 Pigment Red 122, 192, 206, 207, 209 Pigment Violet 19, 42 [37]
Quinophthalones	Pigment Yellow 138, 143
Red Lake C	Pigment Red 53
Rhodamines (Basic Dye Complexes) (CX 779F)	Pigment Red 81 Pigment Violet 1

Pigment Name	C.I. Name
Toluidine Red	Pigment Red 3

47. Examples of azo pigments are hansa yellows, diarylide yellows, dinitraniline orange, pyrazolones, red lake C, BON red, lithol red, permanent red 2B, lithol rubine, and napthol red pigments. (CX 3101M; 3102R, Z). Examples of polycyclic pigments are phthalocyanines ("phthols"), quinacridones, carbazole violet, flavanthrone yellow, indanthrone blue, and perylenes. (CX 3102R, V; Smith 1354).

48. The crystalline structure of a commercial phthalocyanine blue pigment is either alpha- or beta-phase. (CX 3102CC). The alpha-form phthalo blues (or alpha blues), which are green-shade (GS) blues, are Pigment Blue 15 (also sometimes referred to as Pigment Blue 15:0), Pigment Blue 15:1 and Pigment Blue 15:2. The beta-form phthalo blues (or beta blues), which are red-shade (RS) blues, are Pigment Blue 15:3 and Pigment Blue 15:4. (CX 16L; 114F; 1839R). There is also a metal-free (no copper atom) phthalo blue, which is Pigment Blue 16. (CX 144F). Phthalo green pigments come in two shades, a blue-shade (BS) and a yellow-shade (YS), which are Pigment Green 7 and Pigment 36, respectively. (CX 114G; 1839R). Phthalocyanines are sometimes referred to as copper phthalocyanines (CPC) or as "PCN." (CX 200C; 204A, H; 3202C).

B. *The Production Process Of Organic Pigments*

49. Organic pigments are synthesized from chemical constituents in a process that is generally similar for all organic pigments. The raw materials which are used to produce organic pigments are precursor chemicals known as "intermediates." (Smith 1317). Major intermediates used in the production of azo yellows are dichlorobenzidine (DCB), MNPT, and arylides (AAA, AAOA, AAMX, and AAOT). (CX 2022; 3101M; 3946VVV; Smith 1325). For azo reds, the main intermediates are C-Amine, beta naphthol, BON acid (BONA), tobias acid, 2B-acid, and 4B-acid. (CX 2042W; 3101M; 3946UUU). These intermediates are in turn based upon the following derivatives of petroleum or coal tar: benzene, toluene, xylene, ethylene, and naphthalene. (CX 2042W; 3101M; Smith 1467). All organic pigments are in some way derived from one or more of these five basic building blocks, which are all compounds of carbon. (Smith 1585–86). [38]

50. The production process of organic pigments may be divided into two separate phases; pigment synthesis and "finishing". Synthesis is the formation of the organic pigment molecule by a chemical reaction of the component parts of raw materials. Finishing (also known as "conditioning"), usually involves the physical modification

of a pigment to give it desirable end-use properties. Finishing includes surface treatment of pigment particles, alteration of particle size, and alteration of particle distribution. (CX 3102AA–BB; Smith 1322–23; Malchick 2993–95). Synthesis and finishing are not always clearly separable. For example, for many azo pigments, synthesis yields products in pigmentary form. (CX 3102BB–CC). Most pigments require a separate finishing step. (Smith 1324).

51. Organic pigments are synthesized in a reaction vessel, in which pigment intermediates and other reaction ingredients are combined under carefully controlled conditions, such as temperature, pH level, and concentration of reactants. After synthesis is complete, various finishing steps may be applied. The pigment slurry is then filtered and pumped to a filter press, where it is washed with water to remove impurities. The resulting product is pigment "presscake," a water-wet pigment paste containing about 60–80% water. [***]

52. These vessels can be used for production of some inorganic pigments, such as iron blue and chrome yellow, as well as for production of organic pigments. [***]

53. Presscake can either be sold as is, or it can be used to produce dry colors or dispersions. (CX 3102BB; [***]. If used for dry colors, the presscake is dried in ovenlike units for specified times, and then the pigment is pulverized by grinding. [***] Each batch of dry color is typically blended with other batches to control the color of the products to be sold. [***] Dry color can be sold as is, or dispersed with other materials. When dispersed, it usually is combined with a liquid and then used by the coatings or inks industry. If it is dispersed with dry materials, it is normally used in plastics or rubber applications. [***]

54. The production process for polycyclic pigments is somewhat longer than the process for production of, for example, simple azo pigments. [***] Polycyclic pigments generally require some additional equipment compared to azo pigments, such as explosion-proof vessels and buildings in which to conduct the synthesis. [***]

55. The initial synthesis of quinacridones, phthalos, flavanthrones, indanthrones and carbazole violet creates a "crude" material which is still an intermediate. This crude must be properly **[39]** prepared for finishing. This step may involve a kind of grinding; in the case of these pigments, "salt-grinding" is a process very commonly used in the United States. [***]

56. Following salt-grinding, these pigments are finished in much the same way as other organic pigments are finished. [***] testified that these steps—the filtration of the pigment from the slurry

created from the crude material, and the drying and pulverizing of the pigment to produce a dry color—are "areas of commonality" between polycyclic pigments and other organic pigments. [***]

57. Production equipment for pigments like carbazole violet, flavanthrone yellows, indanthrone blues, phthalos and quinacridones is very similar. The equipment can be, and has been, used interchangeably. [***] uses the same equipment to produce both phthalocyanines and carbazole violets. Asked if switching production of one pigment to the other was common, he said: "We can and we do." [***]

58. [***] testified that [***] "routinely" uses the same equipment to produce phthalo blue and carbazole violet, cleaning the equipment between each use. [***] He testified that [***] has produced quincridones in the same reactor it has used to produce phthalos. [***] He also testified that [***] has used the same equipment to finish both phthalocyanines and flavanthrone yellows, again cleaning the equipment thoroughly between each use. [***]

59. [***] are produced with a vessel for the initial synthesis, a vessel for washing, a grinder, additional tanks for washing, and "filterpresses" (devices used to squeeze much of the water out of the pigment following the washing and leave it in more easily manageable "presscake" form, which may be sold commercially or finished in other ways). [***]

60. The equipment for azo pigments is similar to that for polycyclic pigments after the stage at which the crude intermediate is ground. In fact, much of this equipment is interchangeable. **[40]** [***]

61. A major obstacle to such interchange is the need to clean equipment used to produce, for example, a red pigment before it is used for a yellow pigment, and the possibility of contamination of the pigment if the equipment has not been thoroughly cleaned. [***] Another factor is the economic cost associated with it. In addition to the labor costs of cleaning, the lost production time during cleaning is a cost that must be considered. (Malchick 3176–77). [***] However, because of contamination problems, the equipment may sometimes be "dedicated" to one pigment despite the fact that the equipment could otherwise be used to produce other types of pigments. [***]

62. There are some differences among the production processes used for various organic pigments. Some azo pigments (*e.g.*, Pigment Yellow 12) do not necessarily have a finishing step between synthesis and filtration. (CX 3101O; 3102BB; [***]). The type of vessel and medium in which synthesis takes place may also be different. [***] are produced in aqueous solutions in unpressurized vessels known as

"coupling tanks" (or "strike tanks"), whereas the synthesis of [***] is a solvent-based process done in a "reactor" which is sometimes pressurized. [***]

C. *The Physical And Functional Characteristics Of Organic Pigments and Pigment Products And Their Uses*

63. The physical properties of an organic pigment determine the pigments end use application. (Smith 1312–13). These properties include: shade, color strength, cleanliness, transparency, lightfastness, chemical fastness, heat fastness, bleed resistance, dispersibility, and rheology. The quality of a pigment is essentially determined by its value-in-use. (CX 3102K).

64. The shade of a pigment is its color as perceived by a viewer. (Smith 1311). Color strength (also known as tinctorial strength) refers to the coloring power of a pigment. The cleaniness refers to the pigment's degree of color; it is the opposite of dirtiness of color. (Smith 1312).

65. Transparency is a property which is important in the production of process printing inks and metallic automotive coatings. An ink made with a transparent pigment will allow the [41] color of an underlying ink to show through (and combine with) the color of an overlying ink, thereby producing a multi-color image. (Smith 1310). Pigment transparency is necessary in a metallic car coating so that the aluminum flakes in the coating can reflect the pigment color which overlies them. (Panush 2204).

66. Lightfastness, chemical fastness, heat fastness, and bleed resistance concern an organic pigment's ability to resist the degrading effects of sunlight, chemicals, heat, and solvents. A pigment which is lightfast will not fade or darken under exposure to sunlight. Similarly, a chemically-resistant pigment is unaffected by sulphur dioxide and other chemicals. Resistance to sunlight and chemicals are important properties of pigments used in coatings, particularly automotive coatings. (Smith 1309; Panush 2232–36). Heat resistant organic pigments are required in the coloration of plastics because of the latter's high processing temperatures. (Smith 1309–10). Bleed resistance, or solvent resistance, is the ability of a pigment to remain completely insoluble in solvents. (Smith 1311).

67. Dispersibility concerns the ease with which organic pigment particles are incorporated in the vehicle or substrate in which they are applied. (CX 966B; Panush 2216–19).

68. The rheology of a pigment is measured by its properties of flow (fluidity). Floculation refers to the tendency of some pigment particles to aglomerate in a vehicle to form blotches. Rheology is an

important attribute of a pigment used in printing inks. (CX 3102K; Smith 1307–10).

69. "Value-in-use" refers to the relationship between a pigment's price and its tinctorial strength. Thus, a blue pigment priced at $4.00 per pound which was twice the tinctorial strength of a $3.00 blue pigment, has a lower "cost" than the $3.00 pigment. In other words, the "money value" of the $4.00 pigment would be higher. (CX 3102K; 3202D; Aschner 5411–12; McKenzie 6920).

70. "High-performance" refers to an organic pigment's physical properties. High-performance pigments are those which have excellent end-use properties (such as fastness to light, chemicals, etc.) and which can be used in demanding applications (such as automotive coatings and synthetic fibers). (Smith 1318–19, 1370–71; Panush 2242–43). High-performance organic pigments include phthalocyanine blues and greens, isoindolines, isoindolinones, anthrapyrimidine, flavanthrone, perylenes, quinacridones, indanthrone blue (also known as indanthrene blue or indo blue), carbazole dioxazine, benzimidazolones, asomethines, and quinophthalones. (CX 3101F; Panush 2241–42). **[42]**

71. Organic pigments are sold in a wide variety of wet and dry product forms, including presscake, dry color, and dispersions. (CX 3101J–K; Smith 1315). Presscakes are water-wet granules of organic pigment which are obtained in the manufacturing process before drying. (Smith 1315; Malchick 3008). Presscake contains 60–80% water and can be dried and pulverized to produce dry colors. (Malchick 3009–10). Either presscake or dry color can be used to produce an organic pigment dispersion, a value-added product with pigment content of at least 20%.

72. The most common dispersions made from presscake are "flushed colors." (CX 3102BB; 3418D). In the flushing process, the water content of the presscake is replaced ("flushed" away) by an oil-based liquid known as "vehicle" or "varnish." [***]

73. Along with dry colors and presscake, flushed color is one of the three most common commercial forms of organic pigments used today. (Malchick 3008).

74. The equipment required for one production line for flushed colors [***] costs approximately $500,000. Because of the danger of color contamination, separate production lines are used for blue, red, and yellow flushed colors. [***]

75. Hilton-Davis introduced flushed colors to the printing ink industry. In the late 1940s and early 1950s, Holland Color (Chemetron's predecessor) and Federal Color (Sun's predecessor) entered the flushed color business, at first selling to small ink makers and

eventually selling to the very large ink makers. Most U.S. manufacturers of oil inks today use flushed colors. (CX 2012B; Counihan 5525–28).

76. Flushed colors compete with other forms of pigment products for use in various applications. Flushed colors achieved their substantial role in the printing ink industry through direct competition against dry colors (Counihan 5685–87), and flushed colors are currently marketed by salesmen who emphasize advantages of flushed color over dry products. (Weissglass 2514–15). Flushed colors also compete with dry products in coatings applications. (Counihan dep. CX 5087NN–OO). [43]

77. Presscake and easily dispersing (ED) dry pigments have mounted a counterattack against flushed colors. (Geiss 10,723–24). The easily dispersing (ED) pigments in particular are viewed as a threat to flushed colors. (CX 1958G–H; 2047E; Malchick 3297–98, 3299). [***] promoted easily dispersible pigments against flushed colors. (CX 204B, V; Aschner 5473–74). The competition between flushed colors and other product forms is expected to intensify (CX 1958G–H) as a result of the research and development efforts of companies [***] (Geiss 10,723–24; Bock dep. CX 5085CC; Hahn dep. CX 5089B–E).

78. Organic pigments are used to impart color to a variety of products, including printing inks, coatings (paints), plastics, rubber, textiles, carbon paper, and artist supplies. (CX 1951B; 3307D; 3987A; Malchick 2876–80). The major users of organic pigments are the printing ink, coatings, and plastics industries, which together account for about 95% of all organic pigment consumption. Printing inks are the largest users of organic pigments (about 55% of total consumption), with coatings (25%) and plastics (15%) as the next largest users. (CX 1839; 1951B–F; 1958J; 3307D; Whittemore 1930–31).

79. Some organic pigments are predominantly used in one end use application. Most diarylide yellow pigments, for example, are consumed by the printing ink industry. (Aschner 5359). Usually, the same organic pigment can be sold to a variety of end users. (Smith 1369–70). Thus, diarylide yellows can be used in coatings, plastics, and textiles as well as in inks. (Smith 1367). Phthalocyanine pigments can be used in virtually all applications. (CX 114D; 3801E–F). Product catalogues distributed by organic pigment companies also indicate that a particular organic pigment is often suitable for a range of end-use applications (CX 114D–J; 4018).

80. Each end-use has its own technical and performance needs in connection with its use of organic pigments. (Schober 1646; Panush

2240–44; Malchick 2876–80; Aschner 5390–91). In discussing product development, [***] with responsibility for organic pigments sales, emphasized the importance of "application testing" in which a pigment product is tested in each of the end use applications in order to alter or tailor the pigment's properties to suit the particular technologies and requirements of the end use industry. [***]

81. Marketing of organic pigments is generally end-use oriented. Producers typically have part of their sales force specialize in serving one of the three major end use industries, printing inks, coatings and plastics. Salesmen generally have an extensive background in one or more of the end uses, and rely on [44]other sales and technical personnel in connection with other end uses. (Papillo 1871; Alsager 3575–84; Parker 4945). Some organic pigments producers also divide their technical service staff along end-use industry lines (Alsager 3723–24).

82. Many pigment producers have become rather specialized, with product lines geared primarily to one or two end-uses. For example, Apollo and Magruder Color cater primarily to the printing ink business, while DuPont and Rhinechem cater primarily to the coatings industry. CPD, before its acquisition by BWC, catered primarily to the printing inks and coatings business. Even among those companies which are not specialized, the focus within the company is on different end-uses. [***]

83. There are four major printing processes used today in Europe and the United States: letterpress, offset (lithographic), flexographic, and gravure. (CX 1951B–E; Stammen 2380; Whittemore 1926–29).

84. Letterpress printing uses plates that have raised surfaces. The ink is put on the raised surface, which is pressed against paper to print an image. Letterpress printing, used for newspapers and some magazines, comprises about 15% of all printing and is decreasing in popularity. (CX 1951C; Whittemore 1926–27; Stammen 2382–83).

85. Offset printing, also known as lithographic printing, is used to print newspapers, magazines, and books. About 40% of all printing is done with the offset process, which has several steps. First, a solution (known as "fountain solution") covers the parts of a plate cylinder that are not to be printed. The plate cylinder then comes in contact with ink rollers, which put ink on the parts of the plate cylinder that are not covered with the fountain solution. Next, the inked cylinder prints onto an offset "blanket," a cylinder which transfers the ink to paper on an impression cylinder. Offset printing is done either on individual sheets of paper (sheet-fed) or on a

continuous web of paper (web offset). (CX 1951C–D; Whittemore 1927–28; Stammen 2382).

86. Flexographic printing, like offset printing, uses a transfer cylinder. The printing is done on flexible artificial substances (such as polyethylene) used in packaging. Flexographic printing represents about 20% of all printing. (CX 1951C–D; Stammen 2383–85).

87. Gravure printing, which accounts for about 25% of printing, is divided between publication gravure (used to print magazines, catalogues, and newspaper supplements) and packaging gravure (used to print cartons for products like food and cigarettes). The gravure process is basically the opposite of letterpress. A gravure cylinder has small, engraved cells of varying depths, in contrast to the raised surface on a letterpress cylinder. After the gravure cylinder [45]is rotated in ink, a "doctor blade" removes the ink from the cylinder's surface but leaves the ink which is in the small cells. This remaining ink is then transferred onto the print medium. (Whittemore 1928; Stammen 2385–86).

88. Four-color process printing is used to reproduce color photographs on a printing press by overlaying one color on top of another. Layers of yellow, red, blue, and black ink are printed, and the different layers combine to form a multi-color image. Process printing can be used in any printing process (offset, gravure, etc.). (Smith 1310; Stammen 2458; Malchick 2962).

89. Different types of inks are used by the letterpress, offset, flexographic, and gravure printing processes. Oil inks (also known as paste inks) are viscous, oleoresinous inks that are used in letterpress and offset printing. Virtually all flushed colors are used in oil inks. Fluid inks (also known as liquid inks), on the other hand, are thin, water- or solvent-based inks used in either the flexographic or gravure process. Fluid inks use mostly dry color, as well a some presscakes. (Whittemore 1926, 1930).

90. Approximately 60–65% of ink pigments are incorporated in oil inks, with the remaining 35–40% going into fluid inks. The use of fluid inks is growing rapidly and at a faster rate than oil inks. (Whittemore 1931–32). The growth of fluid inks is due to the increased attractiveness of gravure printing, which in comparison to other printing processes produces higher quality and is more economical in long production runs. (Stammen 2387–99; Whittemore 1932).

91. The coatings industry uses organic pigments in exterior and interior house paints (known as architectural coatings or trade sales paints), automotive coatings, and other industrial coatings. (CX 723QQQ; 3801O–P). Architectural coatings or trade sales paints

comprise more than one-half of all coatings. (CX 1839T). In the coatings business, there has been a shift from solvent-based systems to water-based (aqueous) systems because the latter are safer, more convenient, and more practical. (CX 3307E–F; Aschner 5437–38). The coatings industry uses organic pigments primarily in dry-toner form. (CX 1951F).

92. Coatings and plastics producers place a high value on obtaining a particular color in the product. Stability and light-fastness are also important considerations in the coatings end-use. (Smith 1308–10; Panush 2226–27). Furthermore, organic pigments used in automotive coatings are generally difficult to disperse in the medium in which they are used, and may have less desirable rheology or flow characteristics. (Panush 2205).

93. In the automotive coatings area, in which the aesthetic appeal of a particular shade is important to the automaker, the **[46]** number of shades required is large and the cost of the pigment relative to the cost of the automobile negligible. (Papillo 1881). [***] testified that "Price is not the consideration in development of an automotive color." [***]

94. Several witnesses testified about color popularity and its impact on the automotive coatings end-use. Erhard R. Schober, Director of Marketing for Mobay Chemical Corporation's Pigments Division, the successor to Harmon Colors Corporation (a subsidiary of Rhinechem Corporation), called by complaint counsel as a witness, stated that, even when exposure tests show a given pigment is technically suitable for the coatings end-use, the end-user may not actually use that pigment until the particular shade becomes "fashionable." (Tr. 1651–52). Mr. Panush explained that it is very important in the automotive coatings business to anticipate fashion and styling changes in order to be able to have the appropriate pigments on hand to create the colors desired by the public. He stated that it is necessary for a supplier of automotive coatings to be prepared with a wide range of colors to satisfy the customers' needs. (Tr. 2264–67).

95. Durability is also a very important consideration in the automotive coatings area, and lengthy exposure tests of each prospective pigment are conducted. (Alsager 3637; Hahn 4098). Such tests are conducted at sites in Florida and Arizona for periods of esposure to the sun and the elements ranging from twelve months to more than two years. The exposed test panels are compared with the unexposed panels to determine how much shade, hue and/or strength has been lost. (Schober 1650–52; Papillo 1793–95; Panush 2208, 2220–36).

96. In plastics, heatfastness is often the characteristic most important to producers because of the thermal processes used for their products. (Smith 1310; Geiss 2078).

97. [***] identified Sun's end-use industry customers for organic pigments as paint, printing ink, plastic, textile, cosmetic. [***] [47]

D. *Phthalocyanine Pigments*

98. Phthalocyanine(or "phthalo") pigments are produced from phthalocyanine blue crude, an intermediate product. (CX 1839R; 3604P). Phthalo blue crude is produced (1) by combining phthalic anhydride, urea and copper chloride or (2) combining phthalodinitrile and copper chloride [***] (CX 654C).

99. Phthalo blue crude can be finished to produce phthalo blue pigments by several techniques. [***]

100. Phthalo blue crude is also "finished" to produce phthalo green pigments. (CX 1839R; 3216P). Phthalocyaninemolecules, which are present in blue crude, have 16 hydrogen atoms that can be replaced by halogens, such as chlorine and bromine. [***]

101. Although the finishing of phthalo crude does not change the chemical structure of the phthalo molecule, the finishing process is necessary to convert the crude into a pigment with tinctorial strength and other desirable end-use properties. (Smith 1338).

102. Phthalo pigments are the most important blue and green organic pigments. (CX 3216H; 3604N; 3846GGGG). Phthalo pigments account for about 80% of blue and green pigments used in this country and about 20% of all organic pigments used in the United States. (CX 602O; 654C).

103. The prices of phthalo pigments are moderate and fall in about the middle of the range of prices of all organic pigments. (CX 1251, 3708). Prices of organic pigments vary from about $3 or $4 [48] per pound to $30 or $40 per pound. Phthalo pigment prices range from $4 to $8 per pound. (Stammen 2416; McKenzie 6918; Glassman 8517–19).

104. Phthalo pigments are high-performance pigments, have many desirable performance characteristics and wide end-use applications, including printing inks, coatings, plastics and textiles. Combined with their versatility and moderate prices, phthalo pigments are considered the "workhorses" of the organic pigments industry. (CX 203F; 3202D; 3418T; 3801F; Smith 1371–72; Aschner 5366; McKenzie 6940–42), and they are sold in a wider variety of product forms than other organic pigments. (CX 3418T).

105. When phthalocyanine pigments were introduced in the 1930's, they set new standards for organic pigments. (CX 602O; 1951J; 3604E, L). Their performance properties make them the most

problem-free organic pigments available. (CX 3418T; 3603C). Phthalo blues and greens have outstanding lightfastness, heat stability, and chemical resistance—a combination of properties not matched by other blue and green pigments. (CX 3219C).

106. In the demanding use of automotive coatings, phthalos can produce colors ranging from green-shade blue through yellow-shade green, a range not matched by other organic pigments. (Panush 2273, 2275–76). Phthalos also have high tinctorial strength and excellent transparency and are regarded as "indispensable" to automotive coatings business, along with three other organic pigments: perylenes, quinacridones and benzimidazolones. (CX 3603C; Panush 2279–81, 2342–43).

107. Phthalocyaninepigments have dominated the blue/green sector of the organic pigment industry because of their high value-in-use—*i.e.,* the combination of their high-performance properties and moderate price. (CX 654B–C; 3202D). Their cost-effectiveness in certain applications puts phthalos "in a class by themselves." (Canon 12, 541).

108. Reflecting the importance of phthalo blues and greens in the fields of blue/green organic pigments, many planning and marketing documents of the leading sellers of phthalo pigments contain references to a "phthalocyanine market." [***] (CX 241FF; 3104G; 3202O; 3216Y; 3225I; 3418S–U; 3420E).

109. Reflecting the predominant position phthalo pigments occupy in [***] organic pigment business, [***] appears to pay special attention to the phthalo business. For example, [***] divides its organic pigments business into three product groups (phthalocyanines, quinacridones, and other organic pigments), and divides its organic pigment research and development in the same fashion. (CX 3224B–D; 3232D; 3233B; 3234D). [***] [49][***]

110. A number of BWC's documents also have referred to a "phthalocyanine market." (CX 602O–S; 618A; 1204B). Some of them discussed the size of the phthalo "market" and the shares of BWC and its top competitors within that "market." (CX 215K; 221U–MM; 227AA; 1013F–H; 1841A; 1842L). This type of analysis appeared in planning or strategy documents which examined BWC's position both in the overall organic pigments market and in the phthalo segment. (CX 212; 241FF). For example, [***] a major planning document, analyzed the phthalo market and gave "phthalocyanine market share projections" [***] (CX 212U). This analysis was similar to that done for the all organic pigments market. (CX 212Y–AA).

111. Phthalocyaninepigments were of strategic importance to BWC. (CX 702G; CPF 439; 508–10; 518–19; 536–37). The 1976 Annual

Technical Report, which reviewed the status of BWC's PIC Department, analyzed the organic pigment market (CX 723E–V) and referred to BWC's "phthalocyanine strategy." (CX 723W–CC). Through increased sales efforts, supported by technical and research and development assistance from BASF AG, BWC projected [***] share of the phthalo market by [***] and began planning for possible construction of a domestic phthalo manufacturing facility. These concepts were incorporated into the [***] plan. (CX 723CC).

112. In a similar vein, some industry firms referred to a "phthalocyanine market" in connection with the analyses of their expansion or entry plans. At the request of [***] a chemical marketing consultant, prepared a 109-page report entitled "PhthalocyanineMarket and Business Entry Analysis." (CX 3846; [***]). This report analyzed the U.S. market for phthalocyanines and gave conclusions relating to the advantages and risks of [***] entering the phthalocyanine pigment business. (CX 3846(5)G–(5)N). When [***] considered the construction of a new phthalocyanine plant, it commissioned a market study. The study, prepared by the [***] was entitled "A Strategy for Penetrating the U.S. Phthalocyanine Market." [***]

113. The leading sellers of phthalo pigments maintain a separate research and development group for phthalos within their R&D **[50]** departments. [***] divides its organic pigment research into three pigment groups, one of which is phthalocyanines, and its quarterly research reports contain a separate section for phthalos. (CX 3232D; 3233B; 3234D). [***] R&D program has a separate section for phthalocyanine projects. (CX 3108I–J). CPD, before the acquisition by BWC, had a phthalocyanine R&D group and a senior chemist for phthalocyanines (CX 2005PPP; Malchick 3057) and developed separate R&D plans for phthalocyanine pigments. (CX 2063, 2068FF–KK; 2070F–K; 2071UU–ZZ).

114. There is no separate trade association for phthalocyanine pigment manufacturers. (Smith 1527–28; Whittemore 1994; Geiss 2167; Weissglass 2532; McKenzie 6921–22).

115. A number of industry witnesses testified that there is no separate market or submarket for phthalocyanine pigments. Harold C. Whittemore, Senior Vice-President of Sun Chemical (a leading seller of phthalo pigments), testifying for complaint counsel, stated that he did not believe there is a differentiable phthalocyanine pigment market in the United States. (Tr. 1981). Dr. James Canon, former Vice-President of Harshaw Chemical and General Manager of Harshaw's Color Department, testified for respondent that there is no phthalocyanine submarket and that phthalos are "just another

family of pigments." (Tr. 12,525). No industry witness testified that phthalos constituted a separate or submarket.

116. The Organic Pigment Report series published by the International Trade Commission (ITC) report production, consumption, import and export data for organic pigments for the United States. The ITC Organic Pigment reports break out phthalo blues and phthalo greens from other blues and greens. (CX 16L–M, S–T; 3987K–L).

117. Phthalocyanine pigments and diarylide pigments are the two classes of organic pigments known to contain levels of polychlorinated biphenyls (PCBs) in excess of 50 ppm (parts per million). PCBs are suspected carcinogens. Because of federal regulations effective July 1, 1979 which limit PCB levels to 50 ppm in manufactured goods, phthalocyanine pigment suppliers have been under pressure to modify their production processes to lower the PCB content of their phthalo pigments. (CX 766R). As a result of the PCB problem, the Ecology Committee of the DCMA formed a Phthalocyanine Subcommittee. (CX 3980D; Smith 1528; Weissglass 2533). Dr. Hugh M. Smith, Director of Research and Development of the Pigment Division of Sun Chemical, and a member of the DCMA Phthalocyanine Subommittee, explained the purpose of the group and stated that the Subcommittee "very carefully avoided discussion of marketing aspects in these meetings." (CX 3976–78; Smith 1528).

118. CX 3977 was prepared before the Phthalocyanine Subcommittee of the DCMA Ecology Committee was formed. Its purpose was to present [51]the industry position to the Environmental Protection Agency, which was considering strict regulation of PCBs in the diarylide and phthalocyanine pigment industries. According to Dr. Smith, CX 3977 was an "advocacy document" designed to obtain as much leniency as possibly in the regulation. (Smith 1383, 1530–32).

E. *Disputed Pigments: Carbon Black, Fluorescent Pigments And D&C/FD&C Lakes*

119. Carbon black is an organic pigment in the sense that it consists of carbon molecules and is insoluble. (Malchick 2963–70; Hahn 4042–43; McKenzie 6924).

120. Carbon black is produced through a controlled combustion process in which various types of organic materials are burned slowly to yield carbon residues. (Malchick 3183).

121. About 95% of all carbon black is used as a compounding and reinforcing agent in the production of rubber in the United States. A relatively small amount of carbon black is used to impart black in inks, coatings and some plastics, usually as a blend with other

pigments. (Panush 2366; Stammen 2461–62; Malchick 2963, 3216, 3233–34).

122. The magnitude in value or volume of carbon black used as a colorant in the United States is not known. Richard L. Alsager, Marketing Research Manager of BWC's Pigments Division, produced a rough estimate of the dollar value of carbon black used as a colorant in 1978 at [***] million (Alsager 3747). The reliability of this figure is problematical at best.

123. The price of carbon black is about 50 cents per pound. (Stammen 2465). By blending a black organic pigment with less expensive carbon black, a user would be able to achieve some economy in large volume applications. [***] testifed that carbon black was the "basic black colorant" in his printing ink business. [***]

124. The degree to which carbon black is used as a substitute for organic pigments in such applications as printing inks and coatings is considered to be very small. (Papillo 1841).

125. Although carbon black is an organic product, there is convincing evidence that by trade usage carbon black is not generally treated as an organic pigment and sometimes is treated as though it were an inorganic product. F. 126–27, 139–40, *infra.*

126. The *Colour Index* lists Pigment Black 6 and 7, which are carbon blacks, among inorganic pigments. (Malchick 3224, 3226–28). **[52]**The *Pigments Handbook* (and some end-use industry marketing studies) did not group carbon black with other organic pigments. (Malchick 3215, Alsager 4866–67, 4872–75). Sol Panush, Manager of Color of Celanese Corporation and an automotive coatings specialist since 1941, testified that he considered carbon black to be an inorganic pigment. (Panush 2333, 2366). And there are authoritative chemical reference works which classify carbon black as an inorganic material. (Malchick 3249–50).

127. The 1978–1979 Membership Directory of the Dry Color Manufacturers Association ("DCMA") contains a small number of pigment producers which also produce carbon black. (Alsager 4857–59). But, the names of some firms known to be carbon black producers are not included. (CX 3976D–H; Alsager 4849–53). In any event, Mr. Papillo testified that the activities of the DCMA do not concern carbon black. (Papillo 1841). And the DCMA's recent presentation to the EPA concerning organic pigments specifically excluded carbon black, along with titanium oxide (white), from the scope of the presentation. (CX 3102A, H).

128. Fluorescent pigments are organic or inorganic pigmentary products used in color applications which require luminescence. (CX

3102B; Papillo 1862–63; Whittemore 1988; Malchick 2970–79, 3251–52).

129. Organic flourescent pigments are produced by incorporating fluorescent dyes (organic) into polymar resins and finishing the dyed polymar into insoluble particulate products. (Hahn dep. CX 5088UU–VV; Malchick 2971). Organic fluorescent pigments differ from conventional organic pigments, which are produced by chemical synthesis and finishing. In a sense, organic fluorescent pigments are not true organic pigments; they are pulverized dyed plastics which can be used in pigmentary application.

130. There is a record reference to a report on the plastics industry prepared by the Charles H. Kline consulting firm which called daylight fluorescent pigments "true organic pigments." (Alsager 4873–74). And Dr. S.P. Malchick, General Manager of BWC's Chemetron Pigments Division, likened the production process of organic fluorescent "pigments" to the process used to produce some azo type organic pigments [***] (Malchick 3213).

131. Organic fluorescent pigments are treated as distinct products from organic pigments. The *Pigments Handbook* discusses fluorescent pigments not in organic pigments chapter but in two special chapters entitled "Luminescent Pigments, Organic" and "Luminescent Pigments, Inorganic." (Malchick 3253–54). **[53]**

132. [***]

133. Flourescent pigments are not interchangeable with organic pigments and organic pigment prices are determined without regard to fluorescent pigments. (Papillo 1838A–39; Whittemore 1935).

134. To the extent some organic fluorescent pigments are used in printing inks, coatings and plastics, they are used by the same industries which use organic pigments.

135. D&C lakes and FD&C lakes are colorants (dyes, organic and inorganic pigments) which are certified by the FDA for use in drugs and cosmetics (D&C) or in foods, drugs and cosmetics (FD&C), as the case may be. (CX 3108; Smith 1344–45; Papillo 1862–63; McKenzie 6924). Most FD&C pigments are inorganic and some are dyes. (Malchick 3261–62, 3263–66).

136. The FDA certified pigments and non-certified pigments are not practical substitutes for each other. Sun Chemical produces both Pigment Red 53:1 (Red Lake C) and D&C Red No. 9, which are chemically identical, but Sun's D&C Red No. 9 is considerably more expensive (several dollars per pound) than Red Lake C. (Smith 1345–47). This is typical of the price relationship between D&C colorants and their non-certified organic pigment counterparts. (Whittemore 2001). The reason for the price difference is that Sun must carefully

control the manufacturing process for the D&C colorant so that its purity is acceptable by FDA standards. (Smith 1346). [***]

137. Organic pigment prices are determined without regard to the prices of the FDA certified pigments. (Whittemore 1935–36).

138. Sun Chemical's customers for Red Lake C are different from the customers for D&C Red No. 9. Colorants used in drug and cosmetic products must be FDA-certified colorants and Red Lake C cannot be used. Conversely, customers do not replace Red Lake C with D&C Red No. 9. (Smith 1347). However, [***] testified that certain [***] have been sold as "normal" organic pigments after they failed the FDA's certification tests. He stated that the same equipment and process are used to produce both types of organic pigments. [***]

139. In response to complaint counsel's industry survey, companies which reported 1977 sales data for organic pigments rarely **[54]** reported data for carbon black, fluorescent pigments or D&C/FD&C lakes. The companies which reported data for both were:

Carbon Black
DuPont
Fluorescent Pigments
Crown Metro
Hercules
FD&C Lakes
DuPont
Kohnstamm
D&C Lakes
Kohnstamm
Max Marx
Sterling Drug (Hilton-Davis)
Sun Chemical

(Krause 978–79, 983–84). Neither CPD nor BWC produced any carbon black, fluorescent pigment or D&C/FD&C lake during 1972, 1977, 1978 and 1979 (the years covered by the survey). (CX 9(5)O–(5)P).

140. The organic pigment data collected and reported by the ITC do not include data for carbon black, fluorescent pigments or D&C/FD&C lakes. (CX 16G) (FD&C lakes are not to be reported in the ITC's organic pigments section but rather as dyes); *compare* CX 3987T *with* CX 155B *and* Panush 2366 (companies which produce fluorescent pigments and carbon black are not listed by the ITC as organic pigment manufacturers).

141. "Activated pigments" or "activated products" are obtained

by finely "grinding" certain crudes (intermediate products) but stopping short of completing the finishing process. In this sense, activated pigments may be characterized as "semi-crude" or "semi-finished." (Smith 1474–77). Activated products offer users some economy by permitting them to complete the finishing process with their own equipment. (Kohnle 4552–53). Activated pigments were designed to compete with finished pigments. (Hahn 4107–13).

142. Activated pigments sold by BWC appear to have achieved market acceptance. [***] The magnitude of all activated organic pigment sales in this country is not known. For the purposes of this case, "activated" pigments are treated as organic pigments. **[55]**

143. [***] testified that activated products are "crude" materials because they must undergo further finishing to produce the proper particle size and configuration. [***] testified that activated products are a "kind of organic percursors" which can be further "processed into a pigment," and that "an activated pigment is not a pigment." [***]

F. *Interpigment Competition*

144. In theory, pigments of similar colors are potential substitutes for each other. Historically, there has been little interpigment competition between organic pigments and the less expensive inorganic pigments, for the reason that the performance properties rather than the price determine the end-use applications of a given pigment. However, a relatively small number of inorganic pigments which complement organic pigments of similar colors are sometimes blended with organic pigments for some end-uses within the limits of the performance properties required for particular applications. In recent years, new technologies have made computer-programmed color-matching possible. However, inorganic pigments as a class are not practical substitutes for organic pigments. F. 145–64, *infra.*

145. Some inorganic pigments are or can be used in conjunction with or in place of the more expensive organic pigments in some applications. They include iron blue, ultramarine blue, chrome yellow, molybdate orange, chrome green, chrome oxide green, cadmium pigments and nickel titanate pigments. In all cases, however, the performance properties required for a given application determine the user's decision. (Smith 1532–34; Papillo 1874; Geiss 2151–56; Malchick 2912–21; McKenzie 6912–21; Mertz 7120–21).

146. A 1979 study of organic pigments prepared [***] (a producer of organic pigments) stated that, "Any discussion of the market for organic pigments would be incomplete without some mention of the inorganic pigments which, to some degree, may compete with

organics [***] select inorganic pigments are believed to be in direct competition with organics. [***] (CX 3946SS).

147. An ink producer may wish to produce a certain shade of blue through use of an inorganic pigment like iron blue and/or an organic pigment like phthalo blue. *If* both pigments produce the desired result (*assuming* all other relevant performance characteristics are **[56]**equal), the choice will be an economic one. (Smith 1520–23; Stammen 2454–55; McKenzie 6912–13, 6919, 6952–55; Canon 12,540–41, 12,575). Mr. McKenzie noted that iron blue and phthalocyanine blue also compete in the plastics and coatings end-uses. (Tr. 6914–15).

148. Many publication gravure ink producers mix phthalo blue with iron blue in order to cut the cost of the final product without significant changes in the final result. [***]

149. Ultramarine blue and phthalocyanine blue also compete directly in some end-uses. [***] (Tr. 4902–03).

150. Alkali blue and iron blue also compete in some applications. (Smith 1518–20). Mr. Alsager testified that CPD was keenly aware of the direct competition of alkali blue and iron blue in the typewriter ribbon and carbon paper segment of the ink end use, "where cost development in both iron blue and alkali blue forced the products, in an end use calculation, to be extremely price competitive." He testified that "[d]ual formulas are maintained depending upon the price of iron blue or the price of alkali blue in these applications, and the customers switch back and forth, based upon the prices they are able to negotiate at any point in time." (Tr. 4905).

151. Some producers of organic pigments also produce inorganic pigments for sale to the same end-use industries to which they sell organic pigments. American Cyanamid, for example, produced (until very recently) phthalo blue as well as iron blue, both of which were purchased and used by printing ink producers. Until January 1, 1980, American Cyanamid produced a range of inorganic chrome pigments as well as its line of organic pigments. DuPont, Harshaw and CIBA-GEIGY also produce some of these inorganic pigments in addition to organic pigments. (Lipton 1625; Schober 1698–1712; Papillo 1857, 1874–75; Geiss 2124; Panush 2352–54; McKenzie 6904, 6907–12).

152. Some customers in the major end-use industries purchase both organic pigments and the inorganic pigments discussed hereinabove. (Panush 2204; McKenzie 6907–08; Mertz 7056–59).

153. The pigment user generally seeks a certain color in his particular application, certain performance characteristics (lightfastness, heatfastness, durability and rheology, among others) in his particular application and price. If an inorganic pigment **[57]**meets

the requirements of color and performance, and is cheaper than an otherwise similar organic pigment, a customer will very likely use the inorganic pigment. (Malchick 2876–80).

154. A computer programmed color-matching service available from Allied Color Systems, Inc. can enable a pigment user to obtain a formulation best suited for his performance and economic needs using available pigments, organic and inorganic. The user's requirements are programmed into a computer and the user obtains an analysis of those pigments, organic or inorganic, which best fulfill his requirements. The computer will also indicate whether blends of organic and inorganic pigments will satisfy the customer's requirements, the ratio of the blend and its cost. With this information, the customer can select the color he wants at the lowest possible cost consistent with the performance required. [***]. Mr. Mertz of Applied Color Systems explained that his company produces "color control systems for the use of color formulation and production control in various companies that produce colored products." This includes customers in all end-use segments. (RX 7086; Mertz 7056, 7059–82, 7096–7121, 7104–05, 7172–75).

155. Dr. Malchick and Dr. Bock, a group leader within the development group of Applications Technology for pigments of BASF AG, and in charge of the development of pigments and dyestuffs applications in the non-textile field, testified about the results of chemical tests of selected color samples taken from ordinary consumer products in the United States. Dr. Malchick assembled various pairs of physical exhibits of similar commercial items of almost identical color in this country. (Tr. 2936–59). Dr. Bock and his staff in Germany then chemically analyzed the colorants used in the physical samples. (Bock 3413–18). One of each of these pairs of samples was shown to contain an organic pigment while the other was shown to contain an inorganic pigment. (Bock 3417). *See* Physical exhibits RX 7007 and 7008 (boxes from photographic items, colored "Kodak Yellow"), and RX 7057 and 7058 (tubes of yellow acrylic paint).

156. Some organic pigments have unique properties which make them particularly suited for a specific end-use, and there are no good substitutes for these pigments in that specific end-use. For example, a producer of automotive paint may use a perylene, quinacridone or benzimidazalone pigment to achieve a certain shade, with the requisite durability, that cannot be produced with any other pigments. [***]. However, there are other uses in which several organic pigments or inorganic pigments, or mixtures of the two, can be substituted. [***]

157. Iron blue is used in a blend with phthalo blue in automobile coatings to produce greener shade blues. Yellow shade greens are achieved in auto coatings by blending phthalo blue with [***] [58] [***] Indanthrone blues (organic blues) can be blended with other pigments to replicate red shade phthalo blue. [***]

158. In the printing ink industry, phthalo green is only rarely used in process color printing to achieve a green color. Instead, an ink made with blue pigment is combined in the printing process with an ink made with yellow pigment to get the final green color. The blue pigment may be iron blue or phthalo blue, and the yellow pigment may be chrome yellow or diarylide yellow, depending on the application. (Stammen 2410–14). The end user therefore has a range of organic and certain inorganic pigments from which to choose. His choice is dictated by the performance requirements of the application and the cost of the pigment or pigment mixture. (Geiss 2153, 2167–68; Stammen 2458–59).

159. Mr. Alsager of BWC testified that "Chemetron produced an entire line of composite pigments" to compete with phthalo green. These "Kleer Greens" were combinations of [***] (Alsager 4897).

160. Phthalocyanine pigments, both blue and green, are polycyclic organic pigments some of which have high performance characteristics. Properties of high performance pigments include high lightfastness, good weatherfastness and stability under severe atmospheric temperatures during processing. (Papillo 1776–79; Malchick 3275–79).

161. Unlike phthalocyanines, iron blue and alkali blue are not high-performance pigments. (Smith 1371–72). Phthalo blue and iron blue have different performance properties. (Smith 1579–80; McKenzie 6937–38). For example, phthalo blue is more brilliant and less "gray" than iron blue. (Smith 1579–80; Stammen 2416). The phthalo blues and iron blues used in printing inks are quite different in hue. Iron blue is a red-shade blue, in contrast to the green shade of phthalo blue. (Stammen 2409, 2416).

162. The interchangeability of iron blue and phthalo blue is extremely small. (Papillo 1803). Similarly, viewed in the context of all blue pigments consumed, there is little competition between phthalo blue and alkali blue. (McKenzie 6950–51).

163. In order to achieve a non-reddish blue ink, phthalo blue must be used instead of iron blue. [***]. Also, iron blue cannot be used in place of phthalo blue when an ink is supposed to produce a brilliant printed image. [***]

164. According to a 1976 report to the President by the ITC, iron blue and phthalocyanine blue are not "essentially [59]interchange-

able" in the same uses and therefore not "directly competitive." (CX 3990T). The ITC based this conclusion on the different end uses and cost-effectiveness of the two pigments. Because of its superior performance properties, phthalo blue is used, for example, in automotive coatings and detergent-resistant inks, while iron blue is used in less demanding applications such as carbon paper. Phthalo blue's higher tinctorial strength is more than offset by its higher price. Therefore, phthalo blue is more costly to use. (CX 3990S–T; UUU–WWW).

G. *Price Sensitivity*

165. Pigments are complex and heterogeneous chemical products which are highly end-use oriented. From the demand side, the most important elements are, in a descending order: (1) color, (2) performance properties and (3) price. *See* F. 63–97, *supra.* Consequently, the degree of price competition in pigments, *inter se* or between organics and inorganics, may be expected to be rather small. To the extent that the demand for a given pigment may be said to be primarily a function of its color and performance properties, price sensitivity analysis may not be as meaningful in delineating the product market in this case as it is in most Section 7 cases.

166. Moreover, three considerations further limit the usefulness of price sensitivity analysis in this case. First, it would be important but difficult to hold constant many non-price factors which are known to affect significantly the relationship between organic pigment prices and sales quantities (*e.g.,* a change in demand (taste or government regulation) or in supply (raw material shortage or production stoppage)). (Glassman 9102–07, 9114–16; Kamerschen 11,154–55). *See* RX 2126–30.

167. Second, to the extent the tinctorial strength of pigments varies, a comparison of unit prices of pigments may not reflect the true relative costs of the pigments to the user. *See* RPF 170; Glassman 9180–85. This problem is greatly magnified when one compares the annual average price of organic pigments with the annual average price of inorganic pigments (as respondent did in this case).

168. Third, the amount of time usually required for pigment product modifications and the prevalence of the time-consuming (two to five years or longer) product approval process involved in many end-use applications, strongly suggest that the true competitive relationship between pigments may not be reliably reflected in a comparison of annual price and consumption data. *See* Glassman 9135–36, 9138–42.

169. Not surprisingly, while Mr. Glassman (respondent's expert

witness who sponsored the price and quantity series of RX's) opined **[60]**that his price/price and price/quantity analyses showed that the result was inconsistent with the existence of an organic pigment market and a phthalocyanine submarket, Dr. Kamerschen, complaint counsel's expert witness who reviewed and analyzed the same data, gave the opposite opinion. Nevertheless, the record evidence related to the elasticity of demand and price sensitivity is summarized hereinbelow.

170. No organic pigment can be substituted for another organic pigment without a corresponding change in the properties or performance of the finished product. (Smith 1526–27, 1533–34; Papillo 1859, 1869–70; Panush 2337).

171. The cross-elasticity of demand and interchangeability of use is especially limited in the coatings and plastics end-use industries where the aesthetic appeal of a particular hue or the technical demands of an application process may as a practical matter foreclose substitution amoung pigments. (Schober 1652; Panush 2264–67). A producer of automotive coatings will require, for example, a pigment that has been proven to withstand two years or more of test exposure in Florida. A pigment that lacks such durability or which has not undergone such testing is not acceptable for automotive coatings. (Papillo 1793–94; Panush 2233–34). Similarly, plastics end-use applications require pigments which are resistant to a high degree of heat stress. (Geiss 2078).

172. In process printing, four colors—blue, yellow, red and black—are used, and only pigments or blends of those colors can be used. (Stammen 2399–2401; Malchick 2962). Any other shade would produce unsatisfactory results in the finished product. (Stammen 2458–59).

173. Phthalocyanine pigments are not generally interchangeable with one another. Mr. Panush testified that he was personally aware of some 60 different phthalocyanine blues and 30 phthalocyanine greens, and that these were not directly substitutable for one another. He stated that they are chemically nearly identical products but the difference comes in the processing, in the preparation of the pigment, and the particle size and its distribution. (Panush 2337–41). Mr. Panush further testified that, despite the identity of their *Colour Index* numbers, phthalocyanine pigments designed for the ink industry are not substitutable for phthalocyanine pigments produced for the automotive coatings industry, crystallizing phthalocyanine pigments are not substitutable for non-crystallizing phthalocyanine pigments, and flocculating phthalocyanine pigments are not substitutable for non-flocculating phthalo-

cyanine pigments. (Panush 2337–41; Smith 1526; Papillo 1856–57, 1866–67; McKenzie 6955–56).

174. Michael L. Glassman, an industrial organization economist, who was formerly employed as Chief of the Division of Economic [61] Evidence of the Bureau of Economics at the FTC (later as Assistant Director for Economic Evidence at the FTC and now employed by Glassman-Oliver Economic Consultants, Inc.) testified in respondent's behalf. He prepared a number of exhibits, in an attempt to ascertain whether phthalocyanine pigments were reasonably interchangeable products. These RX's analyzed the change in price over several years for alpah blue and beta blue phthalocyanine pigments and phthalocyanine Green 7 and Green 36. He found one phthalocyanine blue "having a very substantial additional increase in price, Green 7 increasing about the same rate two years in succession and the rate of increase in price of the two remaining pigments plummeting down to just about the 5% range, so that the behavior year-to-year among these pigments is quite different in terms of price." (Glassman 8500). Mr. Glassman concluded that these exhibits showed price movements which were "not consistent with a strong substitution relationship among the pigments . . . and as an economist this will be a piece of evidence that it will be inappropriate to include these four phthalocyanine pigments in the same market for purposes of evaluating the competitive effects of the merger." (Glassman 8499–8501, 8503–11, 8537–41). In discussing the price differences and divergent price fluctuations of different phthalocyanine organic pigments within the same *Colour Index* number, Mr. Glassman concluded that "sometimes these differences in performance characteristics are substantial enough so that the products are really not good substitutes for one another." (Glassman 8525–34). *See* RX 2113 (Pigment Blue 15:0); RX 2114 (Pigment Blue 15:1); RX 2115 (Pigment Blue 15:2); RX 2116 (Pigment Blue 15:3).

175. Mr. Glassman also examined the prices (illustrated on RX 2113) of different producers' blue phthalo pigments within the same *Colour Index* classification and noted that in 1976, the most inexpensive phthalo product was 63% of the price of the most expensive phthalo product. In 1977, that differential decreased to 51%, with the cheapest pigment being sold at $3.42 and the most expensive at $7.02. (Glassman 8518). Mr. Glassman also examined the price movements from year to year, and found in one year such wide movements that created "a situation which generally would be regarded as impossible if these products were really close substitutes." (Glassman 8518). He stated that it demonstrated that the prices did not behave in a fashion consistent with strong substitu-

tion. (Glassman 8500). Mr. Glassman concluded it "is wholly inappropriate to define a market as including only phthalocyanine pigments and, therefore, the exercise of calculating market shares within that market for purposes of evaluating competition is a procedure which has no economic meaning." (Glassman 8547).

176. In an attempt to test the hypothesis that all organic pigments were substitutes and capable of being grouped in the same market, Mr. Glassman analyzed the price movements of different pairs, chosen as the most likely candidates for substitution, of organic pigments over time and found that, for virtually every pair of [62]pigments tested, prices did not move together and frequently moved in opposite directions. (Glassman 8591–8570). From RX 2109, Mr. Glassman observed that the substitution relationship, based on similarity of price movements, of alkali blue with either green shade phthalocyanine blue or red shade phthalocyanine blue was as strong or stronger than the relationship between either of the two phthalocyanines. (Glassman 8496–97, 8502–04, 8541–44). Mr. Glassman obtained similar results from his price/quantity studies of pairs of organic pigments. The price-quantity studies were to test the hypothesis that a rise in the price of one pigment should lead to an increase in the quantity of another pigment, if they were substitutes, as demand shifted to the less expensive pigment. Mr. Glassman observed "generally quite inconsistent reactions of quantities to price changes." (Glassman 8570–77). For only one pair of red organic pigments did Mr. Glassman's analysis show strong substitution. (RX 2122; 2130; Glassman 8564–65, 8571–72).

177. Mr. Glassman concluded that the grouping of all organic pigments was "an inappropriate grouping to determine a market." (Glassman 8453). Mr. Glassman further stated that, based on his review of the transcripts, his conversations with industry members and statistical studies that he performed, "the idea of starting with a common chemistry was a misguided venture in terms of defining a market because it ignores the realities of substitution as it actually takes place . . ." (Glassman 8467). He further stated that, if one assumes the existence of an organic pigments market, one should include at least those inorganic pigments which compete directly with organic pigments included within the market definition, for example, iron blue, chrome yellow, cadmiums, molybdate orange and nickel titanates. (Glassman 8580–81).

178. On the other hand, Dr. Kamerschen, a respected industrial organization economist and Distinguished Professor of Economics, University of Georgia, who testified as complaint counsel's expert witness on rebuttal, concluded that the price data in evidence was

more consistent than inconsistent with the existence of an organic pigment market.

179. On the basis of statistical analyses of price data for 12 selected organic pigments, Dr. Kamerschen observed a significant positive correlation in their prices and concluded that the result is consistent with organic pigments constituting an economically significant product market. (Kamerschen 11,132–34, 11,140–42, 11,144–45). *See* CX 7044.

180. Dr. Kamerschen's statistical analysis also showed that the prices of molybdate orange (an inorganic pigment) are not so highly correlated with the price of the 12 organic pigments as the organic pigments' prices are among themselves. Dr. Kamerschen testified that this was an indication that molybdate orange is not in the same market as the 12 selected organic pigments. (Kamerschen 11,150–51). *See* CX 7044. [63]

181. Dr. Adelman, an eminent industrial organization economist, testifying in surrebuttal, strongly criticized Dr. Kamerschen's reliance on price correlation analysis. In Dr. Adelman's view, Dr. Kamerschen's correlation analysis of organic pigment prices is invalid because inflation tends to make all commodities positively correlated in prices movements, and Mr. Glassman's analysis of relative prices over time is superior to Dr. Kamerschen's formal statistical treatment for the reason that Mr. Glassman attempted to avoid some of the built-in inflation bias. (Adelman 12,237–38, 12,241–43, 12,248–50, 12,257–61, 12,491).

182. From RX 10010, scatter diagram of organic price changes, Dr. Adelman observed that the diagram indicates there is no true correlation among the pigments Dr. Kamerschen analyzed, and that the price correlation Dr. Kamerschen found was attributable mainly to the price surge associated with the oil embargo in 1974 and to a lesser extent in 1975. (Adelman 12,270–76, 12,281–82).

H. *There Are Significant Differences Between Organic Pigments Used In Europe And Those Used In The United States*

189.* Dry pigments are used by virtually all users of organic pigments in Europe. European dry pigments are formulated for use with particular vehicle systems and often are not directly transferable to the United States consumer. (Bock 3399; Hahn 3967).

190. Many printing ink producers in the United States use flushed pigments in which the water from the presscake form is replaced by some kind of oil or other vehicle to create a semi-liquid pigment dispersion. This form of organic pigment may more readily

* There are no Findings numbered 183–188.

be mixed into the material which becomes an oil or paste ink than a dry pigment can if, as is usually the case in the United States, the printing ink producer is capable of using flushed pigments. (Smith 1320–21; Whittemore 1926–33; Geiss 2160; Weissglass 2489–90).

191. Flushed pigments represent approximately half of all organic pigment sales to the printing ink industry in the United States. The printing ink industry consumes approximately half of all organic pigments sold in the United States. (Whittemore 1930–32; Geiss 2160; Alsager 3598–99; Hahn 4105).

192. Historically, European inkmakers use almost exclusively dry pigments and a large segment of the United States printing ink industry is closed to producers of dry organic pigments. (Geiss 2137; Aschner 5341–42, 5373–78; Glassman 8751). **[64]**

193. European ink producers generally make their inks with solvents which are classed chemically as "aromatic." United States ink producers generally use solvents which are classed chemically as "aliphatic." The two types of solvents are incompatible. (Whittemore 1942, 1977–78; Stammen 2437–40, 2467–68; Bock 3399; Hahn 3966–67; Kohnle 4409; Parker 4951–52).

194. An organic pigment developed for use in one ink system cannot be satisfactorily used in the other ink system; the color and color strength will differ markedly, and other characteristics may differ as well. (Stammen 2451–54; Hahn 3962–63; Aschner 5362–64). Mr. Aschner described the difficulties involved in marketing in the United States the pigments created for European end users as trying to sell "a left-handed shoe [where] everybody is buying right-handed shoes." (Tr. 5413).

195. Different organic pigments are used for reds in printing inks. In the United States, barium lithol is most often used; in Europe, lithol rubine is more common. (Whittemore 1964–65; Aschner 5362–64).

196. Different vehicle systems are also used for automotive coatings in the United States and Europe. In the United States, thermosetting or thermoplastic acrylics are used; in Europe, alkydmelamine vehicles. Weatherability requirements are also different. (Whittemore 1942–43). Mr. Parker of ICI testified that European auto coatings producers use a different system with different product requirements than is used in the United States. (Tr. 4952–53).

197. In the production of coatings for architectural uses in the United States, aqueous systems for incorporating the pigment into a paint are generally used. In the production of coatings for architectural uses in Europe, solvent-based systems are generally used. [***].

198. Because of the different technical requirements of organic

pigment users in the United States, it is sometimes difficult for European organic pigments to be accepted and sold in the United States. [***] **[65]**

I. *Organic Pigments Constitute A Valid Product Market*

199. In a formal submission to the FTC made prior to the issuance of the Complaint, respondent took the position that organic pigments was a relevant product market in which to assess the effect of BWC's acquisition of CPD. (CX 1907BB).

200. The record evidence as a whole shows that organic pigments as a group constitutes a valid product market for the purpose of evaluating the competitive effects of the acquisition challenged in this proceeding.

(1) *Industry Recognition Of The Organic Pigment Industry As A Distinct and Significant Economic Activity*

201. BWC's internal documents recognize the existence of the "organic pigments market" and estimate the size of that market and the market shares of BWC and its competitors. (CX 186F,K; 277H–L, Y; 212Y–AA; 702B; 723E–V; 724; 1841A; 1843A; 1951B). For example, [***] BASF and BWC prepared a joint report entitled "Survey of the U.S. Organic Pigment Market and the BASF Group's Position with Respect to It." (CX 703B). Similarly, in BWC's [***] plan the market shares of BWC and its major competitors in the "organic pigment market" are calculated. (CX 241FF). CPD's documents also analyze the organic pigments market and estimate the market shares of CPD and its competitors therein. (CX 1801A–B, H–I; 2047H–L).

202. The organic pigments market has been evaluated as the basis for investment decisions by BASF and BWC. BASF and BWC evaluated the proposed acquisitions of [***] (CX 908; 910B), [***] (CX 955), and CPD (CX 960A, E–F; 927A) in the context of a United States organic pigments market.

203. Other organic pigments producers also recognize that organic pigments constitute a separate market and base their business decisions on their analyses of it. [***] compute their respective shares of the "organic pigments market" in their long-range business plans. (CX 3005B, G; 3010Q, PP; 3104D–J; 3105B). Likewise, [***] analyzes a "U.S. organic pigment market" in its marketing documents and estimates market shares of itself and its competitors. (CX 3302A; 3307B–D). [***] also examines the "organic pigment market" separately from inorganic pigments. (CX 3418C, V, W). In a study completed in 1978, [***] thoroughly reviewed the "U.S. organic

pigment market" as it weighed its alternatives for future involvement in the pigments business. (CX 3801). **[66]**

204. In their documents, manufacturers of organic pigments consider other manufacturers of organic pigments to be their competitors. Strengths and weaknesses in the production and sale of organic pigments and shares of the organic pigments market are regularly analyzed for the following companies: American Cyanamid, American Hoechst, BWC, Chemetron, CIBA-GEIGY, DuPont, Harmon Colors, Hercules, Hilton-Davis, and Sun Chemical. (CX 212K, AA; 239D; 241FF; 1841A; 2047K; 3010FFF–LLL; 3105B; 3302B–C; 3418J–AA; 3801J).

205. Within the PIC Department of BWC, organic pigments and dyes were separate product categories, with separate sales forecasts, and profit analyses. (CX 155B, D, G, H; 186B; 230A–F; 235A–E; 1842D, I). Sun Chemical and American Hoechst sell only organic pigments (CX 2036F; Geiss 2055), and the entire product line of Harmon Colors is organic pigments, except for two inorganic preparations. (Schober 1642). Magruder Color does not produce inorganic pigments; Indol Chemical, [***] has never produced inorganic pigments. [***] From 1973 to 1978, CPD produced only one inorganic pigment. (Malchick 2838). DuPont and American Cyanamid, which sell both organic and inorganic pigments, analyze and categorize the two pigment types differently. (CX 3224B–D; 3418C, V, W).

206. The organization and activities of the Dry Colors Manufacturers' Association ("DCMA"), the trade association for the colored pigments industry are divided along organic and inorganic lines. The DCMA's Ecology Committee is divided into an Organic Section and an Inorganic Section, and the DCMA has an Organic Pigments Subcommittee. (CX 3980D–E). The DCMA has also prepared reports which differentiate between the organic and inorganic pigment industries. (CX 3102A, E; 3973; 3976C).

(2) *Public Recognition Of The Organic Pigment Industry As A Distinct And Significant Economic Activity*

207. The trade association for colored pigments companies is the Dry Colors Manufacturers' Association ("DCMA"). Domestic manufacturers and importers of colored pigments, as well as domestic producers of pigment intermediates, are eligible for membership in the DCMA. (CX 3102E–F).

208. The International Trade Commission ("ITC") (formerly the Tariff Commission) annually issues a report on production and sale of various synthetic organic chemicals, including organic pigments and dyes. The data for organic pigments and those for dyes are

reported separately. (CX 16B). The SIC code which applies to the products [67]included in the organic pigments section of the ITC report is 28653. (CX 16I). These reports are relied on by industry firms to assess their position in the organic pigment industry. (CX 1843; 2013A; 3006H–L; 3801B).

209. Organic pigments are classified under SIC product codes 2865, 28653 and 2865311. Inorganic pigments are classified under SIC product code 2816. Carbon black is classified under SIC product code 2895. *Standard Industrial Classification Manual* (1972).

210. The *Colour Index* places organic and inorganic pigments in separate classifications. (Malchick 3219–24). Similarly, organic and inorganic pigments are discussed in separate sections of the *Pigments Handbook*. (Malchick 3215). Both the *Colour Index* and the *Pigments Handbook* are recognized as authoritative sources of information concerning pigments. (Smith 1306, 1511).

211. The tariffs for organic and inorganic pigments are different. Before the Tokyo Round of tariff negotiations, organic pigment imports were classified under tariff item number 406.70 (CX 3219A; 3989A) and were subject to a duty of 20% of the American selling price ("ASP") of a competitive domestic product, or 12½% if there were no comparable domestic product. (CX 1907M). Inorganic pigments were classified under different tariff numbers and were subject to lower tariffs (only two inorganic pigments had tariffs higher than 10%). (CX 3971B). Following the Tokyo Round, the tariffs and classification numbers for organic pigments and inorganic pigments remain separate. (CX 1233A; 1234E. *Compare* CX 1234E *with* F–H).

212. The U.S. Department of Commerce compiles statistics for organic pigments and exports. (CX 3987F).

(3) *Peculiar Characteristics and Uses*

213. Organic pigments have distinct chemical and physical properties (such as high coloring strength and brilliance) which make them usable in applications for which dyes and inorganic pigments are unsuitable. (F. 40–42, 63–70, 78–80, *supra*).

214. Pigments and dyes differ significantly in their application and uses. Pigments are applied as small insoluble particles which color or opacify a substrate; they retain their insolubility throughout the coloration process. In contrast, dyes are soluble when applied, although they may later become insoluble. (CX 1951F; 3102C; Malchick 2875–76).

215. Generally speaking, organic pigments are more brilliant, purer, richer in color, and available in more varied colors than [68] inorganic pigments. (CX 3102N; 3986A). They are also usually more

transparent (less opague) than inorganic pigments. (CX 3986A; Panush 2207). Organic pigments tend to be less resistant than inorganic pigments to sunlight, chemicals, heat, and other degrading influences. (CX 3102N; 3986A; Malchick 3208–09). These characteristics are of critical importance and dictate that organic and inorganic pigments have distinctly different end-uses. For example, where brightness is required, an organic pigment will be chosen (Schober 1735). Likewise, organic pigments are used in a metallic automotive coating because of their transparency, while inorganic pigments can be used in other automotive finishes. (Panush 2204).

216. The degree of interchangeability between organic pigments and inorganic pigments is limited. (Smith 1578; Papillo 1800–01). When organic and inorganic pigments are blended together in a coating, they generally contribute different physical attributes to that coating. (Panush 2367). Because of their different properties, inorganic pigments are used far less often in printing inks, but more often in coatings and plastics applications, than are organic pigments. (CX 3946SS).

(4) *Unique Production Facilities And Processes*

217. The raw materials used to produce organic pigments are different from those used for inorganic pigments. (Papillo 1802–03). All organic pigments are derived from one or more of the following compounds of carbon: benzene, toluene, xylene, naphthalene, and ethylene. (CX 3102Q; Smith 1585–86). These intermediates become part of the molecular structure of an organic pigment, but they are not part of the structure of any inorganic pigment. (CX 3101M–N; Smith 1557–59). Organic pigments have sophisticated and complex molecules, whereas molecules of inorganic pigments are rather simple by comparison. (Panush 2204, 2207). The technical barriers to the production of inorganic pigments are lower. (Papillo 1858). In fact, some inorganic pigments occur in nature and can be mined. (Panush 2207).

218. From a research and development perspective, organic pigments have a clearly different chemical basis than inorganic pigments. (Smith 1489). A chemist can develop considerable expertise in organic pigments without developing comparable expertise in inorganic pigments. (Smith 1489).

219. There is significant commonality in the equipment used to synthesize and finish organic pigments. F. 49–62, 98–101, *supra.* The equipment can be, and has been used interchangeably. [***] uses the same equipment to produce Pigment Yellow 12 and [69]other diarylide yellow pigments. [***] In addition, by thoroughly cleaning the coupling tank, auxiliary tanks, the filter press, and the drying

and grinding equipment used to produce monoazo yellow pigments, [***] is able to make azo reds in the same production line. [***] The equipment used for rhodamine pigment production is similar to that used for monoazo and disazo pigments. [***]

219A. Respondent has acknowledged that the production technology used to make organic pigments is different from that used for inorganic pigments. (CX 1907BB; Smith 1489). The division of BASF AG which produces organic pigments does not produce any inorganic pigments; indeed, Dr. Erich Stoeckl, the person in charge of BASF's production of organic pigments, stated that he does "not know anything about the process involved in producing inorganic pigments." (Stoeckl dep. CX 5097AA–BB).

220. Besides a commonality of equipment, there is significant commonality of the processes and know-how used to synthesize and finish organic pigments. F. 49–62, *supra.* For example, all azo pigments are produced by the chemical steps of diazotization and coupling. (CX 1951G–H). Thus, the production of Pigment Yellow 12 and Pigment Yellow 14, both diarylide azos, is essentially the same. And there are elements of similarity between the production of yellow and red azos, and between monoazo and disazo pigments. [***] The production of polycyclic organic pigments (*e.g.,* phthalocyanine, quinacridones, and perylenes) is like that of azos in terms of the filtration, drying, and pulverization of the pigment to produce a dry color. [***]

(5) *Distinct Prices*

221. Most organic pigments are considerably more expensive than most inorganic pigments. (Papillo 1801–02; Panush 2207). Organic pigments comprise about 10% of the total quantity but 30% of the total value of all pigments (organic and inorganic). (CX 3986A). Thus, the average price per pound of organic pigments is at least three times that of inorganics.

III. THE GEOGRAPHIC MARKET

222. By agreement between the parties, the relevant geographic market in which to assess the effect of BWC's acquisition of CPD is the United States plus Puerto Rico and the Virgin Islands. (Tr. 162–64). [70]

IV. THE NATURE OF COMPETITION IN THE ORGANIC PIGMENTS INDUSTRY—AN OVERVIEW

A. *A Historical Background*

223. The organic pigments industry in the United States is a mature industry. (CX 1958B). Since the first synthetic organic

pigment (lithol red) was developed in the latter half of the 19th century (RA 27), the snythetic chemical colorants industry worldwide was largely dominated by European chemical companies during the early decades of this Century, and it was not until the 1940's that the organic pigments industry in the United States came into its own. In the early 1940's four pigment companies, DuPont, American Cyanamid, Imperial Color and Chemical and Sherwin-Williams, produced much of the output of the organic pigments industry in the United States. (Counihan 5523–24).

224. DuPont was the largest domestic pigment manufacturer and was integrated vertically. It manufactured raw materials for pigments, manufactured the pigments and also manufactured trade sale paints, industrial finishes and automotive coatings. (Counihan 5523). American Cyanamid became a substantial factor in pigment in the early 1940's by acquiring United Color and Pigment Company and also sold intermediates (raw materials) to other pigment producers. Imperial Color and Chemical was a privately held company which produced organic pigments. (Counihan 5523–24). Sherwin-Williams, which entered the organic pigment business in 1896, was vertically integrated. It manufactured raw materials for pigments, produced the pigments and also manufactured trade sales paints, industrial finishes and automotive coatings. (Counihan 5524). Harmon Color, smaller than these four, manufactured high-performance pigments for automotive coatings. (Counihan 5524).

225. The organic pigment industry is end-use oriented. For some years past, the two main end-use industries which accounted for the bulk of organic pigment consumption in the United States have been printing inks and coatings. F. 78, *supra.*

226. In the 1940's Hilton Davis Color Company introduced flushed colors to the printing ink industry. In the late 1940's and early 50's, Holland Color (Chemetron's predecessor) and Federal Color (Sun Chemical's predecessor) entered the flushed color business. Most United States manufacturers of oil inks today use flushed colors. (Counihan 5525–28; CX 2012B).

227. The impact of flushed pigment technology is demonstrated by the fact that the five leading printing ink manufacturers in the United States today are in the pigment business, serving themselves and also serving the merchant market. These companies are Inmont, [71]owned by United Technologies Corporation; Sinclair and Valentine, owned by Wheelabrator-Frye Corporation; Sun Chemical; Borden Chemical; and Flint Ink. (Counihan 5527). In recent years, in response to inroads made by flushed colors in the ink and coatings applications, certain dry pigment producers have developed and

promoted easy-dispersing pigments (or ED pigments). F. 249–50, *infra.*

228. Although prior to the late 1940's only DuPont had manufactured phthalocyanines (a polycyclic organic pigment) in the United States, as that decade drew to a close American Cyanamid, Standard Ultramarine and Color Company, Imperial Color Company and Thomasset began producing phthalocyanine blue pigments. (Counihan 5528). In 1978, the United States producers of phthalocyanine pigments included Sun Chemical, DuPont, CPD, American Cyanamid, Sterling Drug/Hilton Davis, Hercules, Pope Chemical, Apollo Chemical and others. [***]

229. In 1955, Harshaw Chemical Company acquired the technology to disperse pigments in water. About this time, latex emulsion paints came into the market and Harshaw moved into this field. By this time, commercial forms of organic pigments in the United States included dry pigments, flushed pigments and water-based pigments. (Counihan 5529).

230. In 1957, Farbwerke Hoeschst AG, (one of the three successor companies of I. G. Farben, along with BASF AG and Bayer AG) acquired Carbic Color and Chemical Company and formed American Hoechst Company, Inc. Hoechst had a group of patented yellow organic pigments (called Hostaperms) and was able to sell them in the United States without paying the American Selling Price tariff. In addition, Hoechst had control over the raw materials needed to make these pigments. American Hoechst later constructed a manufacturing plant in Rhode Island to produce the Hostaperm yellows domestically. (Counihan 5533–35). These patents expired in the mid-70's.

231. Also in the late 1950's, Sandoz, a Swiss firm, acquired Fine Chemical Company, and Allied Chemical acquired Harmon Colors. (Counihan 5536). In the 1950's Tenneco acquired New York Color, manufacturer of pigments, and Berkshire Chemical, a manufacturer of dyes, and formed Tenneco Colors. (Counihan 5537).

232. In the 1960's, Hercules Corporation acquired Imperial Color and Chemical Company, and later sold its pigment business to CIBA-GEIGY in September 1979. (Counihan 5536, 5553).

233. During the 1960's, several new organic pigment firms entered the field. In 1964, Pope Chemical was formed to produce flushed colors and expanded into the standard pigments for oil inks, namely, Red Lake C, diarylide yellow, phthalocyanine blue and lithol rubine. (Counihan 5536–37). **[72]**

234. Also in 1964, Chemetron Corporation acquired the Standard Ultramarine and Color Company of Huntington, West Virginia, and

merged it with the Holland Color and Chemical Company to form Holland SUCO Chemical Company, which became the Pigments Division of Chemetron (CPD). (Counihan 5537).

235. In 1964, Magruder Color Company entered the flushed color field by acquiring Adco Color (Counihan 5536–37), and in 1980 purchased Indol, a manufacturer of diarylide yellow pigments. During the 1970's, Magruder has been the fastest growing pigment company in the United States. It moved into a large pigment manufacturing plant in New Jersey in 1977, thereafter purchased a phthalocyanine dispersion company in Chicago and built a plant in Puerto Rico to manufacture Red Lake C and rhodamine pigments. (Counihan 5555–56).

236. During the 1960's, Sun Chemical Company acquired Federal Color Laboratories and merged it with Ansbacher-Siegle to form the Sun Chemicals Pigment Division. Since the Federal Color acquisition, it has become the largest organic pigment manufacturer in the United States. (Counihan 5537–38).

237. In 1969, Apollo Color Company was formed to produce flushed colors for printing inks. Apollo manufactured the standard pigments for oil inks, namely, diarylide yellow, lithol rubine, Red Lake C and phthalocyanine blue. (Counihan 5538–39).

238. In about 1967, Japanese manufacturers began to import phthalocyanine crude into the United States. At that time, American Cyanamid, DuPont, Thomasset, Standard Ultramarine and Imperial were the only firms in the United States that manufactured phthalocyanine crude. The Japanese firms also taught their customers the techniques needed to finish the crude into phthalocyanine presscake for flushing and phthalocyanine dry pigment for resale. According to Mr. Counihan, the Japanese importers thus have placed four new firms in the phthalocyanine business: Apollo, Magruder, Sun Chemical and Pope Chemical. Phthalocyaninecrude imported from Japan is now thought to account for about one half of the available crude supply in the United States. Both BWC and BASF AG presently purchase phthalocyanine crude from Japan. The principal Japanese importers of phthalocyanine crude to the United States are Toyo Ink and Dainippon. (Counihan 5539–41).

239. In 1970, as a result of the CIBA-GEIGY merger, CIBA-GEIGY formed a pigment department in the Plastics and Additives Division, and in September, 1979, acquired the pigment business of Hercules Corporation. (Counihan 5542, 5553).

240. In 1972, Sherwin-Williams sold its pigment formulae and customer list, with the exception of alkali blue, to Sun, and otherwise left the pigment industry. (Counihan 5542). In 1973, General Aniline

and Film ("GAF") closed its Linden, New Jersey, plant [73]and left the pigment industry. (Counihan 5542–43). In 1980, American Cyanamid discontinued the manufacture of chrome pigments and sold its phthalocyanine pigment formulations and customer lists to Sun Chemical. (Counihan 5554).

241. Thus, the 1970's witnessed a major shift in ownership of domestic manufactures of organic pigments through acquisitions. As a result, at the end of the decade, four of the top seven firms in the organic pigment market were owned by large foreign chemical companies. These companies have now completed the long-sought transformation from importers of specialty pigments to full participants in the United States organic pigment market. (CX 1–2; 3946I; RX 2103A). F. 223–32, *supra.*

B. *Capacity Expansions and Areas Of Growth In The Organic Pigments Industry*

242. During the period 1969 to 1980, many of the major competitors in the organic pigments industry expanded their organic pigment production capacities. For example, Du Pont announced plans to build a new quinacridone facility in 1969 (Counihan 5539) and to double its phthalocyanine production in 1970. (CX 602Q; Counihan 5542). American Hoechst invested about [***] million in the new organic pigments facilities at Coventry, Rhode Island between 1970 and 1975 and proposes to spend another [***] million for expansion. (Geiss 2089–92). Similarly, American Cyanamid expanded its azo pigments plant in 1975. (Counihan 5543). CPD constructed a new phthalocyanine green facility at Huntington, established the necessary equipment for the production of perylenes and increased its azo production capacity at Holland, Michigan. (Long 5914–26, 5928–30). Sun Chemical spent $12 million to construct a new diarylide yellow production facility in Muskegon, Michigan. (Whittemore 1916). The new facility, which came on stream in December 1978, represented the first phase of a long-range plan involving the investment of over $30 million in organic pigments production. (Whittemore 1914, 1916; Counihan 5551). *See also* Giniger 7210.

243. Until the late 1970's, the demand for phthalocyanine pigments have generally exceeded the available supply. (CX 282B; 593C; 602S; 706J). A temporary over-supply of some phthalocyanine blue pigments existed in 1975. (CX 187II). The shortage of phthalocyanines arose as a result of the withdrawal of Sherwin-Williams and GAF from the market, a reduction in the available supply of phthalocyanine crude (much of which is imported from Japan), and increased demand in certain end-use segments. (CX 593C). By the

late 1970's, however, there existed a worldwide overcapacity caused, in part, by new phthalocyanine facilities constructed in Europe [***] (CX 1718; 1720; 3202I; 3224D) and small capacity expansions in the United States. (CX 3202I; 3216Y; 3846WWW; Geiss 2142). [74]

244. Although organic pigments is a mature industry, industry firms identified four areas of increased demand and growth. These include replacement of environmentally hazardous inorganic pigments, pigments for plastics, pigments for gravure printing systems and easily dispersing pigments. (CX 3101S; [***]).

245. Since the mid-1970's, the industry has witnessed an increasing growth in the demand for high-performance organic pigments and a concomitant need for development of advanced technology in order to maintain a competitive position in the market. [***] cited his firm's inability to produce pigments with high-performance characteristics as one of the reasons for [***] recent withdrawal from the organic pigment business. [***] testified, on the other hand, that one reason [***] stayed in the U.S. organic pigments market was its ability to develop and market the more sophisticated organic pigments which it had in its product line. [***] The trend to higher-performance pigments can be attributed, in part, to increased demand for technically advanced organic pigments to be used as replacements for inorganics and for use in plastics. (CX 2047G; 3004L; 3106II; 3218G; 3418C; 3607D; 3609I).

246. The replacement of environmentally hazardous inorganic pigments by organic pigments was caused by governmental regulations limiting the amount of lead in consumer products and the permissible level of lead or chrome in the workplace. (Smith 1387–89; Papillo 1807–08; Panush 2287–88). The paints and coatings end-use segment of the organic pigments market began converting from chromate inorganic pigments (such as chrome yellow, chrome green, and molybdate orange) in the early 1970s. (Schober 1676). By the mid-seventies, most of the automobile manufacturers (such as GM and Ford) and the companies that supply automotive coatings to them (such as Celanese, PPG, and Inmont) had switched to organic pigments in place of the chrome inorganics. (Schober 1671–72; Panush 2286; Papillo 1809). The primary organic pigments being used as chrome replacements are isoindolines, isoindolinones, and benzimidazolones, which are high-performance organic pigments. (Panush 2286–87; Smith 1390–91). Although the manufacturers of chrome and lead based inorganic pigments have modified some of their products, they have been unsuccessful in their attempts to regain the business lost to organic pigments. (Panush 2288–90; Schober 1677–78, 1733).

247. The plastics end-use segment of the industry is also considered to be an area of relatively rapid growth for the organic pigments business. (CX 3010J–M; 3946LL; Geiss 2078). The plastics sector generally consumes high-performance organic pigments because of their superior heat and bleed resistance. (Geiss 2078–79). [75]

248. The use of publication gravure inks is also increasing. (CX 3106HH; Stammen 2441). This growth is shown by Siegwerk's recent construction of a new printing ink facility in Iowa. (Stammen 2379–80). BASF's organic pigment assortment contains a large number of products that are particularly suited for gravure systems. (CX 956B; Hahn 4114).

249. One of the fastest growing product forms is easily dispersing ("ED") organic pigments. (CX 2047E; 3101S; 3418D; 3946(7)X). ED pigments are dry, powered organic pigments which contain a small amount [***] of a dispersing agent. (CX 3946(7)S, (7)W). The advantage of ED pigments is that a minimum amount of energy input (for milling, etc.) is required for the pigments to develop most of nearly all of their color strength in the medium in which they are dispersed. [***] Moreover, ED pigments can be applied in all end uses. [***]

250. ED pigments are a product development objective of the organic pigments industry, with the ultimate goal being a true "stir-in" pigment. (Bock dep. CX 5085BB; Counihan dep. CX 5087NN). The European companies—BASF, Hoechst, and CIBA-GEIGY—are the leaders in ED pigments. (CX 1958H; 3946(7)X; Bock dep. CX 5085CC; Geiss 10723–24; Malchick 3299). In the U.S., Sun Chemical, CPD, and Inmont have developed ED pigment products. (CX 3946(7)(x); Counihan dep. CX 5087MM, NN).

C. *The Significance Of Basic Research, Product Development And Applications Research In The Organic Pigments Industry*

251. Compared to the level of technological expertise required by the chemical industry generally, the level of expertise required to successfully compete in the organic pigments industry is above average. (Canon 12531–32; 12571).

252. In order to become a successful competitor in the organic pigments market, a company must make a commitment to research and development. (Schober 1665–66; Papillo 1787–88; Malchick 3319–20; Lipton 1603–04; Hahn dep. CX 5088AA–DD). A research and development program is important to the development of new pigment products, to the improvement or modification of existing products, to meet the changing needs of end users, and to expand a

firm's customer base and its sales to existing customers. (Lipton 1595; 1603–04; Papillo 1787–88; Geiss 2176–77; Panush 2249–51).

253. The level of research and development expenditures for the organic pigments industry exceeds that of the economy in general. [76](Kamerschen 10949–50). The large competitors in the organic pigments market invest substantially greater sums of money in research and development than the smaller firms. (RA 144; CX 3035B; 3120; 3227A; 3414; 3822B; 3842; 3863; 3885; 3901B; 3911; 3932A).

254. Environmental regulations and work-place health restrictions have increased the importance of research and development in the organic pigments industry. (CX 3004L; 3009J; 3215C; 3218G; 3606T; 3607C; 3609I).

255. The organic pigments companies (including Du Pont, Sun, CIBA-GEIGY, Hoechst, BASF) distinguish basic research from product development as they relate to organic pigments. (CX 3515A; 3613A–B; Hahn dep. CX 5088M–P; Geiss 2068). Basic research involves the synthesis of new organic compounds. (Papillo 1789; Geiss 2068). Product development involves the development of new product forms or modification of existing products. (Papillo 1788–89; Malchick 3080–81; Hahn dep. CX 5088M; Geiss 2068; Lipton 1603–04).

256. Because organic pigments must be incorporated into a system for use in inks, paints, or plastics, each of which has its own applications technology and pigments requirements, a company must engage in considerable research in "applications technology" to be a substantial competitor in the organic pigments market. This involves the testing of pigments in different applications and alteration of pigmentary properties to make it suitable for use in an end-use area. Applications technology is an important element in the sale of organic pigments. (Papillo 1785–86; Malchick 2876–80; Counihan dep. CX 5087U).

257. The leading competitors in the organic pigments market have well defined research and development procedures. (CX 1076; 3515D–E; Smith 1422–36). The development of a product from its initial synthesis to commercial introduction generally involves several steps, including: initial experimental synthesis and preliminary testing; laboratory manufacture of a small quantity (about 100 grams) of the pigment and applications testing; pilot plant production and further testing (*e.g.,* toxicological tests); initial production trials and testing by selected customers; and establishment of final production procedures and commercial introduction. (CX 3115D–E; Papillo 1783–84; Smith 1422-36). Although a large variety of

compounds may be synthesized in the laboratory, relatively few of them become commercial products. (CX 3115D–E; Papillo 1783–84; Smith 1422–36; Bock 3452–53).

258. The time and expense required to develop a commercially acceptable pigment varies depending upon whether it is a new chromophore, an improvement of a pigment already in a company's product line, or a modification of a product in a competitor's line. (CX 3515B–D; Smith 1441–42). Generally, the development process requires a period of time ranging from several months to several [77] years. (Malchick 3334; Bock 3452–53; Smith 1436; 1439–42; Counihan dep. CX 5087 PP–RR).

259. Paul Papillo, Vice-President of CIBA-GEIGY Corporation, testified that the time required to move from synthesis to commercialization was 10–15 years for development of a new chemical type or chromophore, 5–8 years for modification of an existing specialty pigment, and 2–3 years for modification of an existing conventional or commodity organic pigment. (Papillo 1786–87; CX 3515 B–D). The costs associated with the development of a speciality organic pigment by CIBA-GEIGY were estimated to be about $3.5 million; for development of a conventional organic pigment, about $560,000. (CX 3515B (based on an exchange rate for 1978 of 56.283 cents per Swiss Franc); Papillo 1848–49; CX 3613A).

260. While Mr. Papillo testified that research and development was important to a firm such as CIBA-GEIGY, BASF or Sandoz (Tr. 1838), he also noted that the speciality pigments developed through this type of research were aimed at the high priced segment of the industry, principally for use in the automotive coatings end use. (Tr. 1881). He also testified that DuPont, the second-ranking firm in the U.S. organic pigment market, has not been active in new chemistry for pigments for some time. (Tr. 1888).

261. [***] attributed his company's position in the United States organic pigments market, in part, to the research and development program of its parent, [***] (Tr. 2138). He also testified that it is not necessary for an organic pigment company in the United States to be strong in research to be successful, citing Sun Chemical and Magruder as examples. (Tr. 2170).

262. Historically, both product patents and process patents have been used by organic pigments manufacturers to protect their production processes. (CX 3601B–H; Geiss 2069). Many of the patents associated with high-performance pigments have expired (Papillo 1796–97), although patents on some perylene pigments and benzimidazolones are still in effect. (Papillo 1797; Geiss 2149; CX 3601 B–H). After the expiration of a patent, a duplication of the product by a

competitor may require specialized equipment, intermediates, and/or process knowledge not readily available to all industry participants. (Papillo 1799–1800). Competitors continue to regard patent activity as a predictor of research capability and competitive potential. (CX 3215B–E; Papillo 1814–15).

263. However, a number of successful organic pigment manufacturers in the United States have engaged in little or no research in the traditional sense. For example, [***] testified that [***] had never successfully developed a new pigment molecule and placed it in the [78]market place, but that [***] had successfully developed pigment products to the stage that they were competitive with pigments sold by other producers. He testified that the industry had seen some technical improvements, but no major technical breakthroughs. [***] also testified that [***] typically focused on the development of existing structures, and that even if a product modification was patented, it was possible to circumvent the patented process. [***]

264. Mr. Weissglass of Magruder, a fast-growing firm, testified that Magruder's research and development budget was approximately [***].

265. Mr. Giniger of Pope, a small but fast-growing firm, testified that Pope's research and development effort is [***] (Tr. 7209).

266. Mr. Counihan, former President of CPD, observed that small flushed pigments manufacturers with a low level of research and development are able to make money while companies with large research facilities have difficulty making money. (Tr. 5561). Mr. Counihan testified that the term research and development as used by CPD essentially described product development, namely CPD would attempt to develop an already existing pigment type to a quality which would be attractive in the marketplace. CPD attempted to introduce pigments which were new to it, but which were already sold by other manufacturers. In any event, it met with little commercial success. (Tr. 5660–64).

267. Mr. Panush of Celanese Corporation testified that, at least in the automotive coatings end use, it is generally important for organic pigments manufacturers to have a research and development capability. (Tr. 2249). This is consistent with the testimony of Mr. Papillo of CIBA-GEIGY, who testified that the pigments developed for automotive end users are high-priced and that automotive end use customers tend to be less concerned with price than other end use customers. (Tr. 1881).

268. [***] stated that one of the factors that led [***] to withdraw from the organic pigments market was the need to develop high-performance organic pigments to compete with the products of

companies like BASF, Hoechst, and CIBA-GEIGY, which expended substantially greater funds on product development. [***] **[79]**

269. Dr. Erich Stoeckl, head of Pigment Production at BASF AG, testified that many major pigments manufacturers have switched the emphasis of their research from new product research to cost reduction and environmental regulatory compliance, and that the development of new compounds has "practically come to a standstill." (Tr. 5056). Dr. Stoeckl further testified that he foresees no major new developments in organic pigments or production in the 1980's. (Tr. 5057).

270. Dr. Gustav Bock who heads BASF's applications technology testified that customers are not willing to pay the additional cost involved in developing new pigments and that, in his opinion, there will not be any major technological breakthroughs in the organic pigments industry in the 1980's. (Tr. 3400, 3498).

271. Dr. Erwin Hahn, director of pigment research at BASF AG, testified that the [***] and other pigments introduced in the last few years by BWC were not technological breakthroughs. (Tr. 4137).

272. [***] its own research activities also noted that increased emphasis on cost reduction and the development of environmentally more acceptable products leaves less room for research into new pigments. (CX 1087A).

273. With regard to phthalocyanines, [***] testified that phthalocyanines in general do not require a higher level of technology than other organic pigments. In fact, phthalocyanine blue does not require as high a level of technology as the average organic pigment. [***]

274. A study conducted by [***] in 1978 (CX 1958) found that: [***] Also, a 1978 [***] study of the organic pigments industry concluded that [***] (CX 3007I). **[80]**

275. Although the discovery of new pigment chromophores is rare, the few developments of new pigment products in the past 25 years have come from the major organic pigments manufacturers, including BASF AG (isoindolines and quinophthalones), CIBA-GEIGY (quinophthalones, azo methines, and isoindolinones), Hoechst AG (benzimidazolone), Harmon (perylenes), Du Pont (quinacridones), and American Cyanamid (BON Red Homologue). (Smith 1357–63). In the last 10 years, the significant technological advancements have been made by BASF, CIBA-GEIGY, and Hoechst. (Papillo 1838–38A; Geiss 2073–74).

D. *Marketing And Technical Service*

276. Organic pigments are largely heterogenous and strongly end-use oriented, and as such require a marketing force which

understands not only the technical performance characteristics of particular pigment products but also the technical requirements of the pigment user. And technical service provided the user is an integral part of organic pigment marketing. (Geiss 2067; Parker 4949–50, 4963; CX 2042PP).

277. An organic pigment manufacturer's technical service department (as distinguished from research and development) is generally responsible for evaluation of competitive products as well as products developed by its own research and development laboratories, quality control, and solving technical problems and providing technical assistance to end users. (Counihan 5746–47; Geiss 2071). The level of technical service provided by an organic pigments manufacturer is important to end users because of its role in developing and modifying pigment products for specific applications. (Stammen 2426–27; Panush 2211–14; Malchick 2876–80).

278. An organic pigments manufacturer must have a direct sales force (as opposed to manufacturer's representatives) (Counihan 5786–89) which has received substantial technical training. (Schober 1646–47). A well-established organic pigments sales organization is difficult and time consuming to develop. (CX 960D; Counihan 5667–68; Counihan dep. CX 5087FFFF–GGGG).

279. In order to be a successful competitor in the organic pigments industry, a company must obtain product approvals from end users of its pigments. Product approvals are a prerequisite to sales. (Schober 1753–54). Generally speaking, an end user will not buy a pigment product until he has tested that product in the formulation or application in which it will be used. (Papillo 1788; Aschner 5390–91). The time required to obtain product approval ranges from a few months (for some ink uses) to several years (for automotive coatings uses). (Papillo 1783–95; Schober 1655–57; Panush 2237). In the automotive coatings segment of the market, end users will not test pigment products unless the supplier has a demonstrated [81]technical competence and service capability. (Papillo 1832–33; Panush 2209–13). The complexity and cost of reformulating a pigment system precludes easy substitution of established pigments. (CX 3223I). Once a reputation for quality and service is developed, it is hard to dislodge established pigment suppliers. (CX 204C; 3008E).

E. *The Scope Of Product Line*

280. Organic pigment manufacturers that can offer their customers a wide range of products (chemical types in a variety of forms, *i.e.*, dry, flushed, dispersed) have a competitive advantage over producers whose product lines are limited. (Schober 1740; Geiss 2177; CX 3119;

3846 (5)K; 3946V; 3613A). A producer of a broad line of pigments is a more viable supplier than companies that specialize in a limited field of application or type of pigment, other things being equal. (Schober 1752–53; Counihan 5750–51; Weissglass 2490; Aschner 5441–42).

281. The major competitors in the organic pigments industry offer a wider variety of pigment types and forms for more end-use applications than the smaller competitors. (Stipulation dated January 4, 1982; Whittemore 1911–12; Geiss 2056, 10,698–99).

282. Organic pigments manufacturers sometimes purchase organic pigments from competitors and resell them to their customers in the same or modified form. (Geiss 2094–95; Weissglass 2490; Aschner 5367–68). One reason for this practice is to fill out or broaden its product line. (CX 187J; 769TTT; Weissglass 2490; Aschner 5367–68, 5441–42). CPD, for example, purchased and resold Pigment Green 36, the only major phthalocyanine blue/green pigment which it did not produce. (CX 779F–G).

F. *Organic Pigment Prices And Price Changes*

283. Historically, organic pigment prices have tended to rise about 10% in two-year cycles. In 1974, however, inflation resulted in a 30% across-the-board price increase. (CX 203D). From 1975 through 1977, the average price per pound of organic pigment sold in the merchant market (excluding captive consumption) increased at an annual rate of about 7% each year (11% from 1974 to 1975 and 1975 to 1976, but negative 2% from 1976 to 1977). (CX 1801A).

284. The pace of price rises for organic pigments increased beginning in late 1977 and continuing into 1980. In August 1977, for example [***] announced identical price inceases for P.R. 48 (Red 2B), which were followed by [***] (CX 233B), [82]but did not hold. The following month, [***] increased its price for Red 2B to the same level from which the other competitors had attempted the increase. (CX 235B). At the same time, [***] increased their prices for phthalocyanine blue pigments by 5%. (CX 235B).

285. In 1978, the major organic pigments producers increased prices twice. In April 1978, [***] increased prices across the board. (CX 255B). Again, in August 1978, [***] increased their prices for Pigment Red 48 and, effective September 1978, for phthalocyanines. (CX 257D).

286. In April 1979, [***] increased their prices for organic pigments (CX 275A; 6013), and the prices held. (CX 282B; [***]). In March 1980, when BWC announced a new round of price increases, Sun, Du Pont, American Cyanamid, Hilton-Davis, and Magruder indicated that they would follow. (CX 290D).

287. Certain companies appear to have established themselves as

price leaders in certain product types. American Cyanamid, for example, was considered to be the price leader for barium and calcium lithol red (P. R. 49:1 and 49:2) pigments. (McKenzie 6943–44; CX 3415B). [***] is the price leader for quinacridones. (CX 3009M). Harmon and BWC are price leaders for certain organic pigments sold to the automotive coatings end-use segment of the market. (Aschner 5491–93; CX 240B). However, the large number of products, many of which are heterogenous, in the organic pigments market and the complex product and pricing structure of the industry are not conducive to price coordination among industry firms. (Glassman 8769–81; Adelman 10084–90). Dr. Kamerschen, complaint counsel's expert witness, however, expresed a view that the organic pigments industry members nevertheless had the ability to coordinate their pricing. (Kamerschen 10,975–81).

288. [***] testified that prices in the organic pigments business have not kept up with inflation. He stated that when [***] attempted to increase prices to bring them into line with costs it was forced by price competition to retreat to former levels and that it was the small competitors that were particularly effective price competitors. [***]

289. Mr. Allan Weissglass, President of Magruder, testified that considerable price cutting occurs in the organic pigment industry. (Weissglass 2525).

290. Dr. Kohnle, of BWC testified that there are many sales off list price, and that discounts differed from one product to another. (Kohnle 4501–03). *See also* Kohnle Deposition Testimony. (CX 5091L–K). [83]

291. Mr. Counihan, former president of CPD, testified that one of the twin problems faced by CPD during the time he was its president "was the intensive pricing pressure by the competition." (Counihan 5690). He further stated that although there are price lists for organic pigments, "[n]othing is being sold at the list price. Everything is under the market." (Counihan 5691).

292. Dr. Canon, former vice-president of Harshaw Chemical, testified that the phthalocyanine prices have been chaotic. (Canon 12,520).

293. Mr. Aschner, former marketing manager of BWC's PIC department, testified that selling below list prices was "very common" particularly since competitors registered American Selling Prices higher than actual market prices. (Aschner 5335) He stated that there was no such thing as "a fixed price and a stable market," (Aschner 5336); [***] He observed that there was a substantial amount of off-list selling of organic pigments (Aschner 5407–11) and

that "list prices are rarely what customers pay for any toner." (Aschner 5338).

294. A number of Commission Exhibits in evidence tend to confirm the conclusion that the organic pigments industry is price competitive.

295. [***] document assessing the diarylide yellow "market" notes that "the current published book prices are at least 10–15% higher than the actual market selling prices." (CX 3009M). Also an [***] Semi-Annual Report for 1976 commented that there were pricing battles with respect to different pigments including 3B Reds, lithol rubines and phthalo blues. (RX 6003J).

296. [***] report prepared for [***] in December 1979 commented that green shade phthalocyanine, "although listing at a higher price than red shade, actually is sold at a lower price because competition is keener." (CX 3023Q).

297. The [***] Long Range Plan (CX 3105), [***] noted certain companies that competed on the basis of pricing, including Montedison (CX 3105D), American Hoechst (CX 3105F), Borden (CX 3105I), Du Pont (CX 3105L), Industrial Color (CX 3105S), Magruder (CX 3105U), Pope Chemical (CX 3105V), Roma (CX 3105X) and Uhlich (CX 3105Y). Similar characterizations of industry members are found [***] [84]

298. The [***] Long Range Plan noted that the ink industry, [***] is highly price competitive, a factor which had held [***] to periods of small or negative sales increases during the late 1970's. (CX 2047E–G).

G. *Vertical Integration*

298–A. Organic pigments manufacturers which also produce intermediates (from which organic pigments are manufactured) have an advantage over those which do not. (CX 3215C; 3846(5)K–(5)L; 3946JJ; 3989J). An organic pigments manufacturer that produces a substantial amount of its required intermediates can establish a strong market position in the finished pigments which are produced from those intermediates. (CX 2052 (CPD - C-Amine based products); CX 3415A–B (American Cyanamid - lithol reds)), have a cost advantage over unintegrated competitors, and a strategic advantage in having a secure source of raw material supply. (Papillo 1812–13; Counihan 5736–37; Counihan dep. CX 5087SS–WW; Kohnle dep. CX 5090EE–HH). A number of foreign and domestic organic pigments manufacturers produce varying amounts of their requirements for some intermediates. [***]

298–B. A few organic pigment producers are forward-integrated into end uses, such as industrial and architectural coatings and

printing inks. *See* F. 227, *supra;* F. 522, 527, *infra.* Organic pigment suppliers generally do not view such captive consumption as their sales prospects. (Schober 1660–61).

298–C. The relataively limited number of intermediates suppliers can make the availability of raw materials sometimes unreliable. (CX 3218J; Canon 12,553–54). In 1974, when a severe shortage of raw materials developed (Weissglass 2527), integrated manufacturers were able to comand premium prices for their organic pigments. (CX 2045A; 3223D; Canon 12,549–50; Counihan 5672–73).

H. *Market Intelligence*

298–D. The major organic pigments manufacturers regularly monitor the pricing changes, capacity expansions, and product introduction attempts of their competitors. (Schober 1661–62; Counihan 5559–60; Bock 3429–30). *Also see* CX 702H; 704C–G, L–N; 705A; 726A; 3017; 3018; 3113; 3204. Market intelligence is developed through contacts with competing salesmen (Schober 1662) and customers. (CX 704P, AA, FF–GG, LL). Competitors also maintain contacts through the trade association (DCMA) (Counihan 5559–60), visits to competitors' plants and other meetings. *See* CX 704V–Z, CC–DD; 907, 919, 951; 3003F; 3017–18; 321D–G; 3204C; 3205; 3408; 3409A; RX 6102A–B. **[85]**

I. *Resales of Organic Pigments*

298–E. Organic pigments manufacturers sometimes purchase some organic pigments from competitors for resale in the same or modified form to end users. (Papillo 1809–11; Aschner 5367–68, 5419–20; Weissglass 2489). Resales can be profitable (Weissglass 2490), and can make a contribution to a manufacturer's fixed costs. (Geiss 2095). A competitor will also resell organic pigments in order to fill out or broaden its product line. (Weissglass 2490; Aschner 5367–68, 5441–42).

298–F. A manufacturer may sell pigments to competitors for resale in order to increase his products' market penetration (Papillo 1810–11) and to develop a source for products which it does not manufacture but may want to buy for resale. (Aschner 5471–73). A manufacturer may also sell a competitor a product for resale in order to keep the competitor from producing that pigment himself. (CX 719B; 1334A; 3205A). The prices of pigment products sold to competitors are generally at a discount of between 10–20%. (Aschner 5421–22).

298–G. BWC and CPD sold significant quantities of organic pigments to others for resale (CX 1821; 1842G; 2029) and were active resellers of organic pigments produced by others. (CX 9(5)G–(5)N).

298–H. [***] purchased phthalocyanine pigments from BASF AG in Europe, imported them into the United States through Amercian Hoechst and sold them [***] (Aschner 5422–23; Kohnle dep. CX 636A; 638A; 5090Y–Z). [***] resold phthalocyanine pigments purchased from BASF/BWC for a period of two years. (CX 719A; 1334A). [***] believed that by selling to such "co-manufacturers," it could "track" the sales of the products and eventually obtain the business directly and also deter the co-manufacturer from building its own production facilities. (CX 212D; 719).

J. *Government Regulation And Competition In The Organic Pigments Industry*

298–I. Organic pigments manufacturers faced an increasing number of environmental and work-place safety regulations throughout the 1970s. (CX 1958B, D, H–J; Counihan 5650–52). Most of the regulations which affect the organic pigments industry are promulgated under the Occupational Safety and Health Act and the Toxic Substances Control Act. The latter is enforced by the Environmental Protection Agency and requires registration by all chemical companies, including organic pigments manufacturers. (Weissglass 2533). **[86]**

298–J. The regulations which have had the most pronounced impact on the organic pigments industry relate to the use, handling, and treatment of dichlorobenzidine (DCB), which is used in the manufacture of diarylide yellow organic pigments, and polychlorinated biphenyl (PCB), which is a by-product associated with the production of diarylide yellow and phthalocyanine pigments. (CX 654D–E; 704M–N; 766; 3977M, U; Smith 1364–65). These materials must be stored separately and disposed of through primary and secondary waste treatment facilities. (Counihan dep. CX 5087PPP–QQQ; CX 3305L–O). The Dry Color Manufacturers Association (DCMA) established in its Ecology Committee special subcommittees responsible for analyzing the effect of government regulations on the organic pigments business and representing the industry's viewpoint before the appropriate regulatory agencies. (Counihan 5650–52).

298–K. One result of the government's environmental and occupational safety regulations has been to increase the costs borne by organic pigments manufacturers. (CX 3009I–K; 3024D; 3107KK; 3218D; 3219D; 3946K; 3989I; Mecke 4174–75). Some have predicted that the increased costs may hasten the exit of firms out of organic pigments production and discourage new entry. (CX 2047G; 3101T; 3606T; 3607C; Counihan dep. CX 5087PPP–RRR). However, the organic pigments industry has successfully adapted to the increasing number of regulations and the burdens they impose (Weissglass

2524–25), by adjusting production plans and modifying products and processes. Magruder, for example, considered and rejected manufacturing diarylide yellow because of the regulatory costs associated with constructing a new facility and acquired Indol, which produced diarylides. (Weissglass 2494–95). [***] as the location for a new diarylide yellow pigments facility in part because of the relatively low waste treatment costs associated with that site. (CX 3109H). [***] made significant investments to create a "PCB-free" process for phthalocyanine crude, suffering a temporary decrease in the profitability of its phthalo business. (CX 3203C). [***] has experienced significantly increased costs as a result of new investments in waste treatment facilities. (CX 3202N).

K. *Significance Of Imports Of Organic Pigments And Competition*

298–L. The leading competitors in the United States organic pigments industry view the market for organic pigments from a worldwide perspective. (Lipton 1597–98, 1605; Whittemore 1941; Nicoll 10,673–74; McKenzie 12,179).

298–M. The dollar value of organic pigments imported into the United States increased more than six-fold from 1968 to 1977 and the ratio of imports to apparent consumption (United States production plus imports less exports) of organic pigments in the United States [87]has tripled. (CX 3986G). The following table illustrates the yearly increases in the value of organic pigments imported and consumed in the United States:

Year	Value of Imports ($000)	Ratio of Imports to Apparent U.S. Consumption
1968	4,940	3.6%
1969	8,783	5.5
1970	10,622	7.2
1971	12,966	8.0
1972	12,017	6.6
1973	16,647	8.2
1974	27,305	10.3
1975	20,278	9.5
1976	32,346	10.1
1977	36,437	11.5

(CX 3986G; 3989E).

298–N. During the period 1968 through 1977, more than 75% of the organic pigments imported into the United States (on a dollar value basis) were produced in West Germany and Switzerland. (CX 3986F; 3989E). The following table illustrates the dollar value and

percentage (in relation to total imports) of organic pigments imported from West Germany and Switzerland:

	Imports From W. Germany		Imports From Switzerland	
Year	Value ($000)	% Of All Imports	Value ($000)	% Of All Imports
1968	2,125	43	2,410	49
1969	4,095	47	3,883	44
1970	4,659	44	4,825	45
1971	6,302	49	5,624	43
1972	4,888	41	5,518	46
1973	7,206	43	6,003	36
1974	12,553	46	9,179	34
1975	8,281	41	6,303	31
1976	13,488	42	12,618	39
1977	16,246	45	[***]	[***]

(CX 3986F; 3989E).

298–O. CIBA-GEIGY of Switzerland has been the single largest producer of organic pigments imported into the United States. And, Hoechst AG, Bayer AG, and BASF AG, all off-shoots of I.G. Farben, are the other three principal producers of organic pigments imported into the United States. (CX 3801K; Krause 978–79; Stipulation dated January 4, 1982). [88]

298–P. Because of the continuing increase in organic pigment imports, the major domestic manufacturers pay close attention to the activities of the leading foreign producers. (Whittemore 1941; Papillo 1815–17; Geiss 2072–73; McKenzie 12,179). The DCMA obtains for its members import data from the Bureau of the Census. Sun Chemical, the top-ranking firm in the United States organic pigments market, routinely tests organic pigments offered for sale in Europe.

298–Q. The dramatic increase in the level of organic pigment imports in the 1970s was in part the result of a significant reduction in the tariff negotiated in 1967 (at the so-called Kennedy Round) and phased in over a five-year period. (Alsager 3757–58; Counihan dep. CX 5087DDDD). As of 1972, a two-tiered tariff system was in effect, under which an imported organic pigment that had a competitive counterpart in this country was assessed a duty of 20% of the "American selling price" (ASP) of the domestic product. (Alsager dep. CX 5083EE). The ASP was based upon prices of domestic products registered with the Bureau of Customs. (CX 3410–11). If the imported product had no competitive counterpart in the United States, then the duty was determined by applying a formula to the

product's FOB price. The tariff on such "non-competitive" products generally amounted to about 15%. (Geiss 10,718).

298–R. The tariff on organic pigments was radically revised in 1980. (CX 1230–31; 1233; 1907M–N; 3028). The ASP formula was replaced by a formula under which so-called "competitive products" are assessed a duty equal to 31.3% of their "transaction value" (similar to FOB price) and "non-competitive products" a tariff equal to 20.4% of their transaction value. The applicable tariff rates will decrease by an equal amount each year for eight years until they reach 20% on competitive products and 8.3% on non-competitive products. (CX 1233A). When the tariff reductions are fully implemented in 1987, the duty applied to imported organic pigments will have decreased 36% from its 1979 level. (CX 1233A; Alsager dep. CX 5083HH–II).

298–S. During the recent tariff negotiations, the organic pigments industry vigorously opposed a tariff reduction for fear that it might lead to another substantial rise in organic pigment imports. (Alsager dep. CX 5083AA, CC–DD, JJ–KK; 3219A–U; 3973B–C). The tariff reductions that began in 1980 can be expected to increase the level of imports of organic pigments in the future. (CX 2047E; 3846XXX–ZZZ; Geiss 10,719–20).

298–T. To the extent that the United States organic pigment market becomes more accessible to foreign producers and imports remain uncontrolled by leading domestic suppliers of organic pigments, imports can have a moderating effect on the organic pigment industry in the United States. **[89]**

V. EFFECTS OF THE CHALLENGED ACQUISITION

A. *Chemetron Corporation Pigment Division (CDP) And Its Acquisition By BWC*

299. CPD, a division of Chemetron Corporation, was formed by the combination of the Holland Color and Chemical Company, located in Holland, Michigan, and acquired in 1944 by National Cylinder Gas (later to become Chemetron Corporation) and Standard Ultramarine and Color Company, located in Huntington, West Virginia, and acquired by Chemetron in 1964. (Counihan 5563–65).

300. On November 30, 1977, Chemetron Corporation was acquired by Allegheny Ludlum Industries, Inc. ("ALI"). (Sweeney 7370). At the time or shortly thereafter, ALI informed Chemetron Pigment Division (CPD) of its intention to sell CPD and to cut CPD's budget to a subsistence level. (Counihan dep. CX 5087K–M; Sweeney 7372).

301. Several companies expressed interest in buying CPD, includ-

ing CIBA-GEIGY, Rhinechem Corporation (Bayer/Harmon), BASF (BWC), Dainippon, and Sandoz. (Sweeney 7371–72; Counihan dep. CX 5087M). [***] (RA 123). Rhinechem's proposed acquisition of CPD was enjoined on October 20, 1978, by the United States District Court for the Northern District of Illinois. (RA 126; *FTC v. Rhinechem Corp.*, 459 F.Supp. 785 (N.D. Ill. 1978)). CPD once again had several serious suitors, including BASF (BWC), Sandoz, and Dainippon. (Sweeney 7375–77). On November 17, 1978, ALI, Chemetron Corporation, and BWC executed a purchase agreement for the sale of CPD's assets to BWC [***] (RA 127). The acquisition was consummated on March 23, 1979. (RA 128).

(1) *CPD's Production And Sale Of Organic Pigments*

302. From 1972 to 1978, CPD's sales of organic pigments (dry toner basis) were:

1972	$13.66 million
1973	21.81 million
1974	29.31 million
1975	23.91 million
1976	33.72 million
[***]	[***]
[***]	[***] [90]

(CX 2 (1978); 1801A (1972–1977)). Except for the industry-wide recession in 1975, CPD's sales grew steadily [***] between 1972 and 1978. (CX 1839U).

303. CPD's exports of organic pigments also grew before the acquisition. Exports nearly doubled between 1977 and 1978, [***] (CX 2; 9LLL, UUU).

304. Dr. Malchick, General Manager of CPD/BWC, characterized CPD as "one of the broadest line manufacturers of pigments" (Malchick 2821–22), producing "a broad range of organic pigments for a broad range of uses. . . ." (Malchick 2861). Covering the entire spectrum of colors (CX 1839O), CPD's organic pigments included diarylide yellows, hansa yellows, dinitraniline orange, pyrazalone orange, toluidine red, permanent red 2B, lithol red, BON reds, red lake C, lithol rubine, BON maroon, rhodamine pigments, perylenes, methyl violets, carbazole dioxazine, phthalocyanine blues and greens, and alkali blue. (CX 779F; Stipulation dated January 4, 1982). In all, CPD sold [***] different types of organic pigments ([***] which it produced, plus [***] which it resold). (CX 779A, F–G).

304A. CPD sold several of its products under tradenames, including:

CPD Trade Name	Chemical Type	C.I. Name
MACATAWA Red	BON Red (calcium)	Pigment Red 52:1
MOLORA Red	BON Red (manganese)	Pigment Red 52:2
SAUGATUCK Red	—	Pigment Orange 46
AZALEAN "B"	—	Pigment Red 200

(CX 779F).

305. A substantial portion of CPD's sales of organic pigments were red, blue, and yellow pigments. (CX 1813; 1839W). [***] (CX 779F; 3987J).

306. CPD's blue pigments accounted for about [***] of all organic blues produced. (CX 1808). CPD sold [***] of all alkali blue in the United States, and was a major worldwide participant as well. (CX 966C; 1843D; Muench 3870). In addition, CPD produced a full line of phthalo blues and had significant sales positions in each type: Pigment Blue 15:0 (5%); 15:1 (14%); 15:2 (43%); 15:3 (15%); and 15:4 (19%). (CX 779F). **[91]**

307. CPD was also a major producer of diarylide yellows in flushed form. CPD sold [***] of all diarylide yellow pigments (dry and flushed combined), and [***] of all flushed diarylide yellows. (CX 1801O). CPD also manufactured phthalo green (Pigment Green).

308. CPD sold its organic pigments mostly in flushed form. It also sold dry pigments, presscake, and other dispersions. (CX 1839O; 2036A). Sales of flushed colors were approximately [***] (CX 1818).

309. CPD's pigments were sold primarily to the printing ink industry, although sales were also made to coatings, and plastics industries. (CX 960F; 2029; 2036A). In 1978, CPD's dollar sales (as-is basis) of organic pigment products were divided among the major end-use industries as follows:

Printing Inks	[***]
Coatings	[***]
Plastics	[***]
To Other Firm For Resale	[***]
Total	[***]

(Source: CX 1821).

310. CPD was a major supplier of organic pigment products (mostly in flushed form) to the ink industry, accounting for [***] of all organic pigments used in inks. (CX 2047I, M). Of CPD's sales (as-is basis, dollars) to the ink industry, [***] were in flushed form, [***] dry pigments, and [***] were presscakes and other product forms. (CX 1816A). Sales to the coatings and plastics industries were [***] dry pigments, [***] flushed and pre-dispersed pastes, [***] presscake and related forms, and [***] in other forms. (CX 1822A).

311. CPD was the [***] producer of flushed color, [***] (CX 1815). [***] considered CPD to be a strong competitor in [***] (Whittemore 1944–46).

312. At the time of the acquisition, CPD produced two important intermediates, phthalocyanine crude and C-Amine. (CX 2042T; Counihan dep. CX 5087A, WW–XX, ZZ). Phthalocyaninecrude is the starting material for all phthalocyanine blue and green pigments (CX 2052S), and C-Amine is used in the production of several red and orange azo pigments. (CX 2052L). [***] **[92]**

313. At the time of the acquisition, the major domestic manufacturers of phthalo crude were [***] (CX 3–7; 602P–Q; 3216Y; 3846NNN, PPP). Other phthalo producers made their pigments from crude imported from Japan. (CX 593C; 3846PPP).

314. Before the acquisition, CPD was largely self-sufficient in phthalo crude, and also sold it in the merchant market. (CX 2042T; 3216Y). Since the acquisition, however, crude production at the Holland and Huntington plants has ceased. (Malchick 3157). BWC, like many others, now uses the low-priced phthalo crude imported from Japan. (Counihan 5636).

315. CPD was [***] producer of C-Amine (CX 2052N), an important intermediate used in the production of azo pigments. (CX 2052L). The following organic pigments are dependent on C-Amine as an intermediate:

C.I. Name	Pigment Name	CPD Product Name
Pigment Red 53:1	Red lake C (barium)	—
Pigment Red 52:1	BON red (calcium)	MACATAWA Red
Pigment Red 52:2	BON red (manganese)	MOLORA Red
Pigment Orange 46	—	SAUGATUCK Red
Pigment Red 200	—	AZALEAN "B"
—	—	MICHIGAN Red

(CX 1839Q; 2052L).

316. The only other domestic producer of C-Amine was [***] and the only other seller of C-Amine in the merchant market was a Korean importer. (Counihan dep. CX 5087YY). [***] (Counihan 5736–38).

317. CPD manufactured an entire family of azo pigments based on C-Amine and captured a leading sales position for such pigments:

Pigment	CPD Share of U.S. Sales (1978)
Red Lake C	[***]
MACATAWA Red (BON red 52:1)	[***]
MOLORA Red (BON red 52:2)	[***]
SAUGATUCK Red (Pigment Orange 46)	[***]

Pigment	CPD Share of U.S. Sales (1978)
AZALEAN "B" (Pigment Red 200)	[***]
MICHIGAN Red	[***]

(CX 1839Q). [93]

318. CPD's business was heavily dependent on sales to the printing ink industry, primarily in the form of flushed and predispersed color. (CX 2047D). A breakdown of sales in the years before the acquisition shows that sales to the ink industry accounted for [***] of CPD's total sales in 1976 (CX 2049D), [***] of total sales in 1977 (CX 2031A), and [***] of total sales in 1978 (CX 1821).

319. Mr. Whittemore of Sun testified that he considered CPD to be a major competitor in flushed colors, but that he did not consider it to be a particularly significant factor in dry colors. (Tr. 1944–45). [***] *Also see* Malchick 3050–54.

320. Mr. Papillo of CIBA-GEIGY testified that he did not consider CPD to be an active supplier of either specialty pigments or phthalocyanines to the automotive coatings end use, even though he was aware that CPD manufactured phthalocyanine blues and greens for the printing ink industry. (Tr. 1867).

321. Mr. Geiss of American Hoechst testified that CPD was largely a manufacturer of flushed color for the printing ink industry, and that with the exception of a limited purpose Yellow HR (suitable for packaging gravure ink applications) developed several years after the prototype product of American Hoechst had come off patent, CPD did not succeed in making any significant developments in the organic pigments field in the 1970's. (Tr. 2162).

322. Mr. Counihan, former president of CPD, testified that CPD's sales were primarily to the printing ink end use industry, including flushed pigments such as azos, phthalocyanine blue and other hues used by the oil ink industry. (Tr. 5635–36). Prior to its acquisition, CPD manufactured low to medium price pigments, such as diarylide yellow, lithol rubine, phthalocyanine blue, permanent Red 2B and alkali blue, but did not manufacture high technology pigments despite several efforts to develop the ability to manufacture such pigments. (Counihan 5638–41).

(2) *CPD's Research And Development*

323. CPD had a growing research and development program. (CX 2005H–X; 2054; 2056–71; Malchick 3301–02). [***] [94][***] During the same period, a Graphic Arts Testing Center was established at the Holland plant in order to test and demonstrate its organic pigment products in an actual performance setting. (CX 2008; Malchick 3303). CPD also constructed a new pilot plant at Holland in

1975 and acquired the ability to explore more complicated processes. Projects tested at the pilot plant included the chlorination of phthalo greens (a process later installed at CPD), and the development of a kerosene-based process to manufacture phthalo crude. (CX 654B, H; Malchick 2827–28, 3302–04; Long 5932–35).

324. CPD's research and development department's main function was product development, which included improvement of CPD's existing products as well as development of counter-offerings to competitor's products. Two other important functions of the department were to reduce manufacturing costs and to develop new process technologies for the production of [***] pigments. (Malchick 3061–62).

325. The research and development department of CPD was divided into two sections, one for pigment dispersions and the other for the chemistry and pigment formation. The latter section had separate research groups for phthalocyanines, azo reds, azo yellows, high-performance pigments, and pigment intermediates and process. (CX 2005H–V; Malchick 3056–57).

326. Among the chemical types that CPD successfully introduced, beginning in 1974, were dinitraniline orange, BON maroon, perylene red, AZALEAN "B", diarylide yellow AAMX (Pigment Yellow 13), and Pigment Yellow 83 (HR Yellow). (CX 2024; Geiss 2080–85; Malchick 3346–48). Perylene red is a "high technology" pigment. In 1977, CPD successfully developed Pigment Yellow 83, a counter-offering to American Hoechst's HR Yellow which came off patent in 1973. Although a number of small organic pigment producers in the United States, including Roma Chemical, MaGruder, Galaxie and Inmont, were able to duplicate and make counter-offerings to Hoechst's HR Yellow earlier than CPD and Sun Chemical, CPD's Pigment Yellow 83 (a resinated product) had performance properties matching or surpassing American Hoechst's and took some packaging ink business away from American Hoechst. (CX 3003B; 3030B; Geiss 2080–85). CPD was also successful in producing several types of Pigment Yellow 74, including one with high lightfastness. (Malchick 3283–84). These "Luna" yellows were developed to compete with DuPont's "Dalamar" yellows and were introduced into the market with a fair amount of success. (Counihan 5643–44).

327. Mr. Counihan, former president of CPD, testified that CPD's laboratory was not a traditional research laboratory but was rather a product development laboratory with little chance of developing complex pigments. (Tr. 5704–05). The real purpose of the laboratory was product development. In addition, by having the research **[95]**

personnel stationed in the production facility, CPD was able to solve the continuing quality problems caused by old and rundown production facilities. (Counihan 5705).

328. Sun Chemical, the top-ranking firm in the market, did not consider CPD as an innovator, although CPD had a good ability to match competitive products within a reasonable time after they were introduced. Mr. Whittemore of Sun characterized CPD's research efforts as a lot of Ph.D's and no output, and testified that Sun "was constantly surprised at the size of their [CPD's] effort and how little came of it." (Whittemore 1945, 1994).

329. [***] testified that "from our selfish point of view," [***] CPD was not strong in research. [***] held CPD's marketing and technical support staff "in low esteem." *Id.* He further testified that prior to the acquisition, CPD did not compete for the [***] business, and even though CPD may have thought they were competitive in [***] they are not today and were not in 1978. (Tr. 2327–28).

330. [***]

331. [***] attempted to develop [***] suitable for use with solvent inks, an ink application which does not use flushed color. Although [***] was able to develop a line of [***] that were approved by customers, [***] (Counihan 5644–47).

(3) *CPD's Marketing Resources*

332. CPD's greatest strength was its marketing force. (Counihan dep. CX 5087FFFF). CPD had a "very strong [and] knowledgeable **[96]**marketing team." (Counihan 5774–75, 5790–94). CPD's marketing/sales department was divided into three branches: sales, marketing, and marketing research. (CX 2005Y). The sales branch, which had nationwide coverage, was headed by a manager and had [***] regional sales managers, [***] salesmen, and [***] sales trainee. (RA 104; CX 2005EE–II). The marketing branch, also headed by a manager, consisted of various support personnel plus five technical service representatives (two for solvent inks, and one each for graphic arts, coatings, and government affairs). (CX 2005CC). CPD's technical service representatives were experienced in the printing ink and coatings industries and acted as liaisons between customers, salesmen, and the CPD research department. They both introduced new products to the customer and explained their application to the CPD salesmen. (Counihan dep. CX 5087FFFF–GGGG).

333. CPD's marketing activities were supported by a large technical service staff (about 30 employees) which was primarily oriented to the printing ink industry. CPD had two technical service managers, one for graphic arts and the other for coatings and plastics. (CX 2005W–X).

334. [***] rated CPD's sales force before the acquisition as average, and stated that its technical service operations spent less money than other competitors. [***]

(4) *CPD's Production Facilities—CPD Disinvestment*

335. Before the acquisition, CPD's Holland plant produced mostly flushed colors and some dry colors operating with three shifts a day, five days a week. (CX 1827; Long 5947).

336. CPD's Huntington plant produced both flushed and dry organic pigments. (CX 1827). Except for a two-week shutdown each year to service equipment, CPD operated the Huntington plant with three shifts a day, seven days a week. (Long 5944–46).

337. CPD had a third organic pigments plant, located in Port Hope, Canada, which began production in about 1971 but was closed down before CPD was acquired by Allegheny Ludlum. BWC has since transferred a salt grinder, two flushers, and a continuous dryer from Port Hope to Huntington. (Long 5966–69).

338. In 1974, CPD established an Engineering Department. Prior to that time, it was necessary for CPD to request engineering services through the Chemicals Group of Chemetron Corporation. **[97]**(Long 5898–99). Since 1974 the Engineering Department added five or six engineers at Huntington and four engineers at Holland. (CX 2005KK–LL; Long 5899–5901). The Engineering Department designed and installed a new facility for phthalocyanine green production at the Huntington plant. This facility was producing phthalo green at the time of the acquisition. BWC has subsequently shut down this facility. (Long 5914–19).

339. The Huntington plant of CPD, formerly owned by SUCO (Standard Ultramarine and Color Company), was built in 1909. According to Mr. Counihan, at the time the plant was acquired by Chemetron in 1964, it was "on the verge of collapsing," and since that acquisition, Chemetron made capital investments "on a band-aid basis." (Counihan 5563–68).

340. Mr. Panush of Celanese testified that he had seen the Huntington plant in the 1950's and it was then [***] (Tr. 2318). Mr. Papillo of CIBA-GEIGY stated that on a scale of one to ten, ten being the best, the Huntingon plant was [***] (Tr. 1898). [***] had considered and decided against the CPD acquisition. (Counihan 5547). The 1977–1982 [***] Long Range Plan described the Huntington plant as being [***] (CX 3105J) *Also see* CX 3106M, 3107L. A 1974 [***] presentation of organic pigments characterized the Huntington plant as [***] (CX 3223F).

341. The executive summary to the BWC 1980–1984 five year plan characterized the Huntington plant as [***] (CX 286B). The

BASF AG evaluation of the acquisition of CPD noted that at Huntington [***] (CX 967EEE).

342. Mr. Counihan testified that, had CPD's management agreed to spend the money to put the Huntington plan in good condition, the problems facing the Division would not be as intensive as they are today. (Tr. 5572–73).

343. Several years before the acquisition, the steel flooring under one of the acid tanks on the fourth floor of the intermediates section gave way and the tank fell to the floor below, smashed a continuous dryer and then fell through to the second floor. (Long 5814; Counihan 5568).

344. A few years prior to the acquisition, a section of steel flooring in the phthalocyanine area of the Huntington plant collapsed and a 20 by 20 foot section tilted down at an angle to the rest of the floor. (Long 5814–15; Counihan 5570).

345. The pipes in the Huntington plant are old. Steampipes failed when they were corroded through. In the case of a bad leak, [98]the operation associated with that pipe had to be shut down and repaired immediately. Once the pipe was shut down, it took between two and eight hours to repair. (Long 5809–10).

346. Process lines at Huntington, used to convey the product from one process to another, often ruptured. (Long 5809). Mr. Long, manager of CPD engineering, testified that in the 1970's CPD "had a failure in virtually every line in the plant." When a pipeline failed, the general procedure at Huntington was to repair only the section of pipe that had failed, for the reason that there was no fund for a total renovation package. (Long 5813). As a result, CPD was making repeated repairs on the same run of pipe. (Long 5811–12).

347. The pumps at Huntington were also in poor condition and in constant repair. At least two maintenance personnel were assigned full time to pump repair, and they would rebuild at least two to three pumps every day. (Long 5806–07).

348. Pumps in an organic pigments plant are used to transfer materials, liquids or slurries, from one tank to another or from a tank to a filter press. The failures experienced with the pumps were either motor failures, shaft failures or impeller failures. (Long 5807). When a pump involved in transferring material from one tank to another fails, the entire process stops. The result is lost production time. (Long 5808).

349. Mr. Long testified that CPD should have bought new pumps in the majority of cases rather than buying rebuilt or used pumps. (Tr. 5813). The reason that CPD did not purchase new pumps was

that they could not get the capital to do a total renovation package. (Long 5813).

350. Laurie R. Hiscock, Works Manager of the Huntington Plant of BWC, testified that the majority of the floors at Huntington are steel plates, with some flooring of concrete and some of grated steel. (Tr. 6017–18). The steel flooring was in extremely poor condition. Mr. Long testified that the floors were buckled in many areas, making it difficult to move across. (Tr. 5806). Mr. Hiscock stated that because of the movement of material and equipment over the floors, the floors tended to bend and separate over a period of time, and as soon as there was any moisture around, the corrosion increased considerably. (Tr. 6018).

351. Mr. Hiscock cited a number of instances where the deteriorating floor conditions caused serious production and safety problems. (*E.g.*, Hiscock 6025–36). He also testified that the condition of the floors in the plant made material handling very difficult within the entire Huntington plant. (Tr. 6018–19). CPD replaced the floor sections in a piecemeal fashion and then, in the words of Mr. Long, waited "very shortly for the next piece to fall." [99](Tr. 5815). The reason all of the flooring was not replaced was that renovation funds were not available to CPD. (Long 5815).

352. The ventilation in the Huntington plant was poor. Hiscock testified that the "almost total lack of dust control, fume control, heat control, air flow, lighting, that all effected . . . . the morale problems in the bargaining unit, and additionally, morale problems within our salaried work force." (Tr. 6056). Mr. Hiscock discussed the drowning tanks used in the manufacture of phthalocyanine pigments, and noted that the large amounts of acid and heat used in this system tend to generate fumes which because of a lack of dust and fume control tend to scatter throughout that area of the plant. The fumes in this area of the Huntington plant corroded the tanks, the supports under the tanks, the vertical steel supports and the supports for the various pipes in the area. (Hiscock 6050–51).

353. The production equipment in the Huntington plant was old and of poor reliability. Mr. Hiscock characterized the equipment variously as "poor, very poor, very very poor" (Tr. 6039) and stated that most of the equipment was old, as much as 50 to 60 years old. (Tr. 6039). Mr. Hiscock testified that when discussing the functioning of the equipment on a day-to-day basis, CPD tended to "talk in terms of unrealiability as opposed to reliability." (Tr. 6040). Without the major pieces of equipment in operation, productivity in certain areas stops completely. (Hiscock 6040).

354. During the period 1971 to 1979, broken equipment was

replaced with used equipment rather than with new and, as a result, CPD experienced continual breakdowns. (Long 5803). Mr. Hiscock testified that during the year prior to the acquisition, under the rules established by ALI, the only thing that merited replacement capital would have been a failure of a major piece of equipment which seriously affected the production of a particular department and affected the availability of products for sales. (Tr. 6039). In most cases, the old pieces would be taken out, overhauled and then reinstalled. (Hiscock 6040).

355. One of the major pieces of equipment required to finish certain pigments is a salt grinder. During the period before 1979, CPD purchased three used salt grinders. (Long 5803). A used salt grinder cost CPD about $100,000 while a new one would have cost about $750,000. (Long 5804)

356. The used salt grinders continually broke down and production time was lost. (Long 5804). During the operation, a salt grinder is subject to considerable shock loading on the gears. When CPD purchased a used grinder it had no idea what the history of the machine was. (Long 5805–06).

357. The continued failure of Chemetron during the 1970's, and later ALI from 1977 to 1979, to provide necessary capital to maintain[100]the plant and equipment, increased the cost of production, increased the amount of substandard products, increased the amount of deadtime on the production lines and adversely affected the profitability of CPD. Mr. Hiscock testified that the poor reliability of the equipment at Huntington tended to make the costs escalate rapidly. When CPD personnel tried to turn on equipment, sometimes it would not run and other times it would spill the product "all over the place," causing large raw material losses or finished goods losses. (Tr. 6053–54). Mr. Alsager of BWC's marketing research testified at his deposition that CPD each year got more and more distressed "garbage" production. Finally, CPD had to have a "fire sale" of substandard material. (Alsager dep. CX 5083U). This substandard material sold for as little as $.50 per pound, discounted from $6.00 per pound. (Alsager dep. CX 5083W).

358. The Holland plant was built in 1919 but since it burned to the ground in 1946, most of the structures at the plant are ones which were rebuilt after the fire. (Counihan 5565). As a result, the condition of the Holland plant at the time of the acquisition was better than that of the Huntington plant. (Counihan 5576–77; Long 5816).

359. The Holland plant, however, was very congested as a result of haphazard expansion over the years. Mr. Long testified that the

Holland plant was very congested and was a difficult plant to work in, since over the years incremental expansion had occurred wherever there was any space free, and as a result the plant was so congested that it was difficult to move materials around in it. (Long 5816).

360. During the 1970's, the Holland plant experienced many of the same types of equipment breakdowns, including breakdowns of pipes and pumps, that occurred at the Huntington plant, causing lost production time. Throughout the 1970's, failed equipment was replaced with used or rebuilt equipment at Holland for the reason that the capital was not provided by either Chemetron or ALI. (Long 5819).

361. CPD's basic maintenance in the plants during the 1970's consisted of greasing and oiling equipment. (Long 5821–22, 5943–44). CPD attempted to institute a preventative maintenance program at the Holland plant in 1978, but was unable to follow through with the program. Mr. Long testified that a preventative maintenance program is desirable, but since the maintenance personnel at Huntington and Holland were continually fixing leaks and other emergencies, they did not have time for "the niceties of preventative maintenance." (Tr. 5822).

362. Most of the process engineering at the Holland plant was done by Research and Development personnel, rather than by the plant's engineering staff. (Long 5822–23). **[101]**

363. Once a product development or improvement was successful in the laboratory, in the 1970's, CPD would attempt to transfer the process into the production plant. (Long 5824–25). CPD encountered considerable difficulty in making this transition, since the production equipment in the plant lacked variable speed agitators, variable flow rates for adding materials to the process, and accurate and reliable temperature controls. As a result, substandard material was produced, and the research and development chemists had to spend considerable time in the plant working around the limitations caused by inadequate production equipment. (Long 5825–26). Time so spent by research and development personnel at the plant was charged to the research and development budget. (Long 5828).

364. Mr. Long, who had been associated with CPD from 1971 until the acquisition, testified that the Pigments Division needed $2.5 million more than they were getting in each year from 1971 to 1979 in order to accomplish the capital replacement and renovation required to place the plants in adequate operating condition. (Tr. 5888).

365. Each year CPD required a maintenance capital budget.

When the final budget was submitted, the Chemetron management would review the amounts requested and announce a final budget allocation for maintenance capital. The [***] capital budget [***] contained CPD's final request to Chemetron Corporation of [***] (Long 5878). The allocation finally approved by Chemetron management was [***] (RX 6762E; Long 5879). [***] (Long 5880).

366. Each expenditure had to be justified on the basis of either the return or profit that would be generated by the expenditure or by a reverse return or cost avoidance rationale. (Long 5860). Although formal submission of cost avoidance justification was not required on every RFE, it was required for most RFEs and it was necessary to have the data at hand to answer telephonic inquiries which Chemetron Corporation was likely to make concerning even the most insignificant expenditures. (Long 5871–74). RFEs for different amounts required approval by either the Chemicals Group Vice-President, the Chairman of the Board or the Board of Directors of Chemetron Corporation. (Counihan 5719).

367. As early as 1972, Fantus, an organization that investigates plant sites, studied the Huntington plant and recommended that it be closed and the operations moved elsewhere. (Counihan 5585). Chemetron's management turned down the proposals. (Counihan 5586–87).

368. Also in 1973, Mr. Long strongly recommended to Dr. Moore, the new group Vice-President, that the issue of whether or not to **[102]**relocate from the Huntington site be resolved as soon as possible. (Long 5850–53). In 1974, Mr. Long prepared a Major Capital Expenditure Proposal which assumed that Huntington would have to be phased out in the near future and recommended the purchase of a small plant on a site large enough for future expansion so that the Huntington operations could be transferred in an orderly manner. (Long 5855–57). This relocation proposal was not accepted by the management. (RX 6778; Long 5857).

369. In 1975, Mr. Counihan made a verbal presentation of the 1975–1980 Long Range Plan to the Board of Chemetron and recommended to upgrade Huntington or close it and construct a new plant. In a letter which was part of the Long Range Plan, Mr. Counihan summarized the situation as "increasingly critical." (Counihan 5616). He reviewed the options of moving to another site or refurbishing the existing plant and finally recommended that the plant be renovated at a cost of roughly ten to eleven million dollars. (Counihan 5616–17). Chemetron's management refused to approve either the renovation capital or the move to a new site. (Counihan 5618).

370. In 1976, after having been turned down on several occasions, Mr. Counihan met with Dr. Moore and suggested that if Chemetron did not wish to invest capital in the Pigments Division they should consider selling the Division. Dr. Moore raised this proposal with Mr. Gallagher, Chairman of the Board, and told Mr. Counihan that Mr. Gallagher did not want to sell the Division. (Counihan 5618–19). In 1977, Mr. Counihan met with representatives of Hercules Corporation, CIBA-GEIGY and Tenneco in attempts to find a purchaser. (Counihan 5544–46).

371. Mr. Sweeney of ALI testified that ALI decided to sell CPD after the acquisition of Chemetron because it was in a business about which ALI knew little, the facilities were less than satisfactory, the company was not at the leading edge of the state of the art, it had heavy capital requirements and because they believed they could find a buyer. (Tr. 7371).

372. When ALI acquired Chemetron in 1977, the Chairman of the Board, Mr. Robert Buckley, told Chemetron's management that he intended to sell the entire Chemical Products Group. (Counihan 5546–47). Mr. Counihan knew that CIBA-GEIGY was interested in purchasing the Division and ALI gave them a right of first refusal. CIBA-GEIGY studied the operation for four months and turned down the purchase because "they could see no way they could handle the Huntington plant." (Counihan 5547).

373. After CPD was acquired by ALI, capital could only be spent to maintain the plant, to keep the plant producing and on clear and present safety hazards. (Long 5863). After the acquisition, all projects which had been approved by Chemetron and on which CPD had [103]been spending funds were cancelled, no money could be spent and the only way CPD could spend capital funds was to justify each expenditure on a project by project basis for the previously approved expenditure. (Long 5864).

374. Mr. Counihan testified that the situation with respect to obtaining capital funds after Chemetron was acquired by ALI "got infinitely worse." (Tr. 5623). CPD was told that since it was going to be sold, it was to be limited in its spending to one million dollars, and it was monitored on a monthly basis to insure that it did not exceed that figure. (Counihan 5623; Long 5864).

375. Dr. Malchick testified that after the acquisition of CPD by ALI, he was told by Mr. Counihan not to work on any long range project, just on projects that would bring CPD money right away. (Tr. 3308).

376. [***] stated that it was his impression that CPD was on a long downhill slide.[***]

377. [***] testified that CPD was going downhill prior to the acquisition, in the period starting in the late 1960's and continuing into the 1970's and that the "Huntington plant was increasingly in bad shape from the standpoint of maintenance, from the standpoint of industrial relations, and that it wasn't being supported with additional investment." [***]. While [***] had "a healthy respect" for Mr. Counihan and Mr. Wickline of CPD, in his opinion other personnel of the Division varied from region to region from good to indifferent.[***].

378. Sun Chemical's perception of CPD as a competitor, contained in the Sun Chemical Corporation Pigments Division 1977–1982 Long Range Plan (CX 3105), was that while CPD's management was pigment oriented, Chemetron Corporation [***] (CX 3105). *See also* CX 3106N (Sun 1978–1983 Long Range Plan).

379. [***] testified that CPD's performance measured on a return on assets after taxes were satisfactory, but that was because the assets against which the return is measured were shrinking over time. The assets were being depreciated on a straight line basis every year, but no new assets were being brought into the Division to correct problems and bring it up to date. As a result, the net asset base was declining every year and when the return on assets figure is calculated, it was quite favorable. CPD was aware of this phenomenon. [***]

380. Dr. Morris A. Adelman, testifying as an expert witness for BWC, inquired into the proposition [***] that CPD had been disinvesting in the recent past and compared CPD's investment patterns with the figures reported in the Bureau of [104]Census' Census of Manfacturers, for the Chemicals and Allied Products industry group and the [***]. It was Dr. Adelman's conclusion, based on RX 2055–64, that for the period 1965 to 1971, all three invested on a net basis, but starting in 1972, although Chemicals and Allied Products [***] continued to invest net, CPD was "disinvesting," namely, CPD "was not spending enough of productive assets to make up for the inevitable loss of productive assets." (Adelman 10,150–52). *Also see* Adelman 10,157–70.

381. Dr. Adelman concluded from RX 2059–62 that "Chemetron is aging, its assets are getting older; whereas, the assets for these other two units cannot be said on the whole that they are going consistently up or down." (Tr. 10,167). He also concluded from RX 2064 that CPD could not have continued this ratio of real investment to real depreciation forever, because they were "living off their fat and sometime or other, they had to turn around and start investing or else the company would have to disappear." (Tr. 10,189).

382. On the basis of the exhibits he prepared and the testimony he reviewed, Dr. Adelman's conclusion concerning CPD's effectiveness as a competitor was that:

> Well, they were an ineffective decreasing competitor and their current market shares was probably a biased predictor, an over predictor of their subsequent market shares. That would be the estimate I make on the basis on the figures that stop in 1978, and it seems to me that the developments other than in the years following do bear out that kind of prediction, because the market share of Chemetron, if you make allowance for the addition of the BWC share, those continue to decrease just as these numbers would predict it would decrease. (Tr. 10,190).

383. After completing his economic analysis of CPD, Dr. Adelman opined that "Chemetron, standing by itself, I thought that their position in the industry was deteriorating and would continue to deteriorate, at least within limits, because of the fact that they had been disinvesting, allowing their productive assets to deteriorate and in part, to disappear." (Tr. 10,085).

384. Dr. Adelman's views regarding CPD's disinvestment is consistent with the testimony of [***] who was of the view that Chemetron had been on a long downhill slide. (Adelman 10,189–90). **[105]**

385. Based on his analysis, Dr. Adelman stated that Chemetron was on a slippery slope, that BASF/BWC could not stay in the organic pigments business in the United States indefinitely in the face of continuing losses and therefore he viewed the acquisition "as a salvage operation of putting two unpromising units together forming perhaps one viable competitor." (Tr. 10,089).

B. *BASF*

386. In 1979, BASF had worldwide net sales of $14,129 billion. (RA 153). This made BASF one of the three largest chemical companies in the world. Stipulation dated February 10, 1982, Exhibit A. *See also* CX 3215N.

(1) *BASF's Worldwide Pigment Position*

387. The manufacture of colorants (dyes and pigments) is BASF's oldest business. (Albers 6250–51). In the course of some 130 years in the dyestuffs and pigments businesses (Kohnle 4531–32), BASF has accumulated a wealth of knowledge and technology. (Geiss 2076–77). BASF, for example, developed the first synthetic organic pigment, lithol red, in the 1890s. (RA 27; CX 3508D).

388. BASF views its organic pigments business on a worldwide scale. (CX 718C; 769TT–GGG; 778; 960A, C–D). And it maintains a sales force and technical service personnel throughout the world. (CX 57Z–AA). BASF is recognized as one of the world's largest

organic pigments manufacturers. (Schober 1680; Lipton 1600–02; Whittemore 1951–52; Geiss 2074–75; Parker 4969–70).

389. BASF estimates its share of the worldwide organic pigments business to be about [***] (CX 963G; 966A; 1951A), and its share of worldwide phthalocyanine pigments market, on a poundage basis, to be approximately [***]. (CX 718C). By virtue of its technology and raw materials position, BASF dominates the European market for Phthalocyaninepigments. (CX 602O). And BASF sets the technical standards for phthalocyanine pigments in major markets. (CX 718R).

(2) *BASF Product Line*

390. BASF manufactures the following chemical types of organic pigments: phthalocyanine blue; phthalocyanine green; metal-free phthalocyanine; BON red 2B (Manganese) Salt; red 2B (Barium) Salt; **[106]**red 2B (Calcium) Salt; perylene; anthrapyrimidine flavanthrone; anthraquinoid; indanthrone blue; metallized azos; quinophthalone; nickel complex; nickel azo; monoazo; pyranthrone; lakes of rhodamine; crystal violet, victoria blue; lithol rubine; tetrachromo pyranthrone; and isoindoline. (RA 25; CX 3508I–J). Additionally, the U.B. Pigmente Division (formerly the Siegle pigments business) manufactures the following chemical types of organic pigments: thioindigo; hansa yellow; diarylide yellow and orange; naphthol red; dinitroaniline orange; toluidine; BON Red 2B (Manganese) Salt; monoazo; arylide; and lithol rubine. (RA 26; CX 3508J).

391. BASF's organic pigments are marketed worldwide under several trademarks, including "Heliogen" (phthalocyanine), "Lithol" (azo metal salts, such as Red 2B and lithol rubine), "Paliogen" or "Paliofast" (high-performance, such as perylenes, flavanthrones, anthrapyrimidines), "Paliotol" (high-performance pigments), and "Fanal" (basic dye complex pigments, such as PMA, PTMA Violets, rhodamines). (CX 129D–O; 1951G–P; 3508K).

392. BASF's organic pigment products are sold to all end-use segments of the industry. (CX 131; 1951G–N). In addition to pigments in dry form, BASF produces a wide range of pigment dispersions. (CX 1140O–Y; 1252A, J–O; 3508L–M). In 1979, BASF modified its pigment nomenclature so that each product number is preceded by a letter which identifies the primary end-use application recommended for the product. (Puff dep. CX 5094R–U). The prefixes "D", "L", and "K" stand for printing inks, paint, and plastics, respectively. (CX 1252C; Hahn 4093–95).

393. The organic pigments manufactured by BASF in West Germany are exported on a worldwide basis. (Stoeckl 5068). And the major United States competitors routinely monitor and evaluate the products sold by BASF in the United States or Europe. (CX 3223C, X;

3508; 3511; 3512; 3513D; 3514; Papillo 1818–19; Lipton 1598–1600; Whittemore 1948).

394. Phthalocyaninepigments are the "backbone" of BASF's organic pigments business. (CX 241CC; 593C; RX 2812V). Recognized as a world leader in the manufacture of both phthalocyanine blue and green pigments, BASF's assortment of phthalocyanines included, in 1976, ten alpha blue brands, 14 beta blue brands, 11 green brands, and 45 phthalocyanine preparations or dispersions. (CX 718R; 1951J; Geiss 2123–25; Panush 2256–59).

(3) *BASF Production Facilities*

395. The BASF Group manufactures organic pigments through subsidiaries or affiliates in Germany, France, the Netherlands, [107] Argentina, Brazil, Mexico, Australia, Indonesia, Spain, Turkey, Canada, Venezuela, and Colombia. (RA 28–29). BASF manufactures organic pigments in several plants in Ludwigshafen, West Germany. (Stoeckl 5061–68). In 1970, BASF acquired G. Siegle & Co., GmBH ("Siegle"), of Stuttgart, West Germany, a manufacturer and seller of organic pigments. Siegle later became a division of BASF Farben & Fasern AG ("F&F AG"), known as the "Unternehmensbereich (U.B.) Pigments" Division. Siegle has sold small amounts of organic pigments in the United States market under its own name. (RA 12; CX 953A).

396. Between 1976 and 1978, BASF constructed a new facility in Brazil (RA 147) and in Ludwigshafen. The new facility in Ludwigshafen (designated as Building C 312) began production of phthalocyanine [***] pigments in early 1978. (Muench 3884–86; Stoeckl 5072–74). The construction of C–312 cost about [***] million, and was to increase BASF's production capacity for phthalocyanine pigments at Ludwigshafen to about [***] tons. (CX 723W; 749B, E; 1717C; 3407A; 3415F; 3508O; 6014; Stoeckl 5075–76). In 1979, when worldwide capacity for phthalocyanines exceeded demand (CX 3224D), [***] (Stoeckl 5110–12). During the same period, BASF [***] (Stoeckl dep. CX 5097N–O; Stoeckl 5078–79).

(4) *BASF's Research And Development*

397. BASF's pigments research and development is conducted in several laboratories in Ludwigshafen, including the Dyestuffs Laboratory, the Development Group Laboratory, the Pigments Development Laboratory, and a laboratory in Sparte CT. Pigments research is also conducted by the "U.B. Pigmente" division in Stuttgart. *See generally* CX 1077–84; 1086B.

398. The Dyestuffs Laboratory, which is the central research color lab, engages in research relating to the synthesis of new

chemical types. (Hahn 4071–73). The production-site laboratories in Stuttgart and Sparte CT, engage in research and development related to modification or improvement of existing BASF products. This function includes work on a pigment's dispersibility, fastness properties, hue or shade, and applicability in various vehicles systems. (Hahn 4071–73).

399. The Development Group Laboratory, headed by Dr. Bock, engaged in applications testing and evaluated competitive products. [108](Bock dep. CX 5085C; Hahn 4071–73). Dr. Bock's group is further subdivided into sections which are responsible for pigments used in specific end-use segments of the industry. (Bock dep. CX 5085B–C). Also within the Technical Services - "Sonder F" Subdepartment of Sparte CP, there exists a "Market Opening Pigments and Dyestuffs" group and technical services group for each end-use industry. (Bock 3456–57).

400. The Development Group laboratory (CPE/SF 1) is BASF's primary link between its research and development facilities and its sales organizations. (Bock 3457). Each year, it receives approximately [***] sample products from the central research laboratory and [***] samples from the production site laboratories. Each of these samples is given an individual "E" (developmental or experimental) number. (Bock 3451–52). After these products are tested further, they may be made available to selected customers for test use. (Aschner 5414-15).

401. BASF approved research budgets for organic pigments in the following amounts for the years 1974–1979:

1974	[***]
1975	[***]
1976	[***]
1977	[***]
1978	[***]
1979	[***]

(RA 144).

402. BASF's R&D has resulted in the development of new chemical types of organic pigments and significant improvements in existing products. BASF developed isoindolines and nickel complex pigments. (Bock dep. CX 5086P–R; Papillo 1838–38A). [***] (Bock dep. CX 5086R–S). [***] (Hahn dep. CX 5089V; Puff dep. CX 5094HH–II). [***] (Bock dep. CX 5085CC; CX 115D–G). Some developments by BASF are patented in the United States. (CX 1807).

403. BASF's R&D capabilities are generally considered to be among the best in the industry. (CX 204N; 3113A–C; 3215B, D, J, N;

3223H, S, X–Y; 3508T–U; Papillo 1838–38A; Geiss 2073–74). BASF advertises its colorants business in the United States as "based on [109]one of the world's largest research and development programs for new pigments, new dyes and improved application technology." (CX 6004; 6005).

(5) *Vertical Integration of BASF*

404. BASF is a major worldwide manufacturer of intermediates used in the production of organic pigments. (Papillo 1813). In 1978 and 1979, it produced some [***] different intermediates used to manufacture organic pigments. (RA 31; CX 1102). And about [***] of the intermediates used by BASF are internally produced. (CX 1101; Muench dep. CX 5092BB–DD). BASF is also integrated forward into the manufacture of printing inks, paints and coatings. F. 2, *supra.*

(6) *The 1978 Reorganization of BASF—Separation Of Pigments Business From Dyestuffs*

405. On January 1, 1978, BASF reorganized the structure of "Ressort" C, resulting in the formation of Sparte CP (Pigments and Auxiliaries), which had previously existed as a part of Sparte CF (Dyestuffs, Pigments and Auxiliaries). (CX 57; Muench 3849–50). The reorganization was necessitated by the rapid growth of Sparte CF and a desire to centralize BASF's pigments business in one organizational unit. (Muench 3851; Albers 6164–65). BASF also felt that by separating its pigments and dyestuffs businesses into separate units, the customers of each would be better served. (Albers 6164–65). Sparte CT continues to manufacture a few organic pigments for Sparte CP at Ludwigshafen. (Kohnle 4529–32; Stoeckl 5059–60).

(7) *BASF's Colorants Position In The United States—BWC*

406. BASF marketed its organic pigments, inorganic pigments, dyestuffs, and auxiliaries in the United States through the Colors and Auxiliaries Division of BWC. The Colors and Auxiliaries Division consisted of four basic businesses: Textile Colors and Chemicals (TCC), Pigments and Industrial Colors (PIC), Leather Finishes/Subox (CLF), and Whitestone. (CX 182D).

407. BWC is an indirect subsidiary of BASF AG. BWC is engaged in several businesses in the United States, including the importation and sale of organic pigments produced by BASF AG. (Albers 6166). [110]Organic pigments was a small part of BWC's business before the acquisition and remains a small part today. (Kohnle 4396). Prior to BWC's acquisition of CPD, virtually all of the organic pigments sold by BWC in the United States (with the exception of a small amount produced at BWC's South Kearny operation) were imported. (Hahn

3957; Albers 6166, 6191; Stipulation Between Counsel Concerning CX 9–43 and CX 2901–24, p. 3).

408. BASF's colorants business in the United States was developed through imports and establishment of domestic manufacturing facilities. (CX 182D). In 1961, a formulation plant for textile auxiliaries and pigments was constructed at Charlotte, North Carolina. In 1967, the Basacryl dyestuffs plant was constructed at BWC's South Kearny, New Jersey site. By 1968, BASF was producing and marketing textile dyes and auxiliaries in the United States. In 1973, a plant for disperse dyestuffs (the Palanil plant) was constructed at South Kearny. (CX 602D; Hahn 3954–55, 4121). BASF considered its participation in the United States colorants business to be inadequate in relation to its worldwide position. (CX 769VVV; 960A; 1006I; Hahn dep. CX 5088FF–KK).

C. *BASF Wyandotte Corporation's PIC Department*

409. BWC's PIC Department started as an import resale business (CX 212D), and was "established to exploit the strengths of BASF technology for the U.S. pigment market." (CX 1951A). The PIC Department markets pigments, pigment dispersions, and dyes for nontextile uses. (CX 114A-B).

410. In 1971, the PIC Department of BWC established a phthalocyanine pigments presscake pilot plant in the Basacryl plant at South Kearny. (CX 212H; 1701A). By 1974, the PIC Department had expanded to include technical service specialists for each major end-use segment of the organic pigments industry, a laboratory which engaged in product evaluation, and a national sales force. (CX 155N; 708U; Hahn dep. CX 5089W). By 1974, PIC Department sales had increased to $11.5 million. (CX 708C).

411. From 1974 through 1978, the PIC Department of BWC continued to expand its operations. (CX 220G; 723DD). It developed an overall strategy designed to exploit the market segments where BASF technology excelled (CX 239D) and generate a sufficient sales base to justify construction of a domestic organic pigments plant. (CX 220A; 239A). To achieve these objectives, [***] (CX 212M; 214D; 220A; 240C) [***] (CX 187LL, BBB, GGG; 212N; 706B; 723X–CC). [111]

412. From 1970 through 1978, BWC as a whole made the following sales of organic pigments in the United States:

Year	Pounds	Value
1970	578,919	$2,348,193
1971	591,463	1,828,518
1972	855,488	3,272,560

Year	Pounds	Value
1973	939,569	3,926,647
1974	899,695	5,132,895
1975	645,792	3,843,627
1976	1,111,815	7,075,864
1977	[***]	[***]
1978	[***]	[***]

(RA 158; CX 1704). From 1970 through 1978, BWC's sales of organic pigments more than [***] on a poundage basis, and more than [***] on a value basis.

413. BWC sold some organic pigments (dry and dispersions) to all end-use segments of the market. (CX 114D–E, H, I, J, N; 1252A–H; 1705; 1709). BWC did not sell any flush colors. BWC's organic pigment sales in 1978 were (on a poundage basis): about [***] to the printing inks industry, [***] to the paints and coatings industry, [***] to the plastics industry, [***] to co-manufacturers (for resale), and [***] to other miscellaneous end-use industries. (CX 1705).

414. As of 1978, BWC's organic pigments product line consisted of some [***] different product codes from the following chemical families: phthalocyanine blue and green, metallized azo (including lithol rubines), perylene, pyranthrone, anthrapyrimidine, nickel complex, flavanthrone, indanthrone blue, quinacridone, carbazole dioxazine, azo methine, quinophthalone, isoindoline, monoazo, and diarylide pigments. (CX 1702H–J; 1703; 1704).

415. BWC did not do basic research in the United States. (Geiss 2159). Although it had access to BASF AG's research and technology in Germany, it was [***] (Panush 2316, 2327).

416. BWC did not manufacture any organic pigment intermediates in the United States. (Hahn 3956–57).

417. With the exception of 1975, the BWC/PIC sales increased steadily from 1970 through 1977. (CX 187AA; 220G; 247G; Hahn 4129–[112]31). Except for [***], its profits were [***] (CX 187AA; 220G; 239B; 247G).

418. In 1970, BWC had [***] salesmen distributed around the country selling pigments. By 1974, that number had increased to [***]. BWC had difficulty recruiting successful, aggressive salesmen because it was a small company with doubtful products and the chances for promotion probably did not look favorable to some candidates. (Hahn 3957–58).

(1) *BWC Had Difficulty In Selling Imported BASF Pigments In The United States In Part Because Of Lack Of Understanding Of United States Pigment Requirements*

419. Dr. Hahn, former general manager, Colors and Auxiliaries,

BASF Corp. (U.S.) and now head of R&D, Sparte CP, BASF, testified that one problem encountered by BWC, when it considered building a domestic plant, was that it did not have enough knowledge about the manufacturing process for individual pigments in the United States. (Tr. 3987). Dr. Hahn also stated that BWC's presscake operation at South Kearny was designed to give BWC greater expertise in phthalocyanine green shade pigments for use in the United States but was never successful. (Tr. 3970–71).

420. Mr. Aschner, former marketing manager of BWC/PIC, testified that the "drehrohroffen" process developed by BASF AG for producing phthalocyanine produced a drastically different color than what BWC had been supplying to Ford Motor Co. for automotive use. This almost resulted in BWC losing its business with Ford. BWC was subsequently forced to physically blend two phthalocyanine standards in order to match the previous phthalocyanine standard. (Tr. 5370–71). Mr. Panush of Celanese Corporation testified that BWC did not understand the pigment requirements of the United States market and was, before and after the acquisition, an unreliable supplier. (Tr. 2316, 2327, 2370–71).

421. BWC lacked the know-how in flushed pigments which were popular among the United States oil-ink producers. (RX 4070I; CX 922B(R)).

422. Dr. Bock, head of pigment application technology of BASF, testified that as a result of the finishing and production methods used in the United States, pigments sometimes have different application characteristics in the United States than they do in Europe. For example, in the printing process for publication gravure [113]in many countries in Europe, toluene is used as a solvent, whereas in the United States, preference is given to mineral spirits. (Tr. 3398– 99).

423. Mr. Aschner testified that BWC was "out of sync" with pigment requirements in the United States. (Tr. 5341). He also stated that BWC sometimes had difficulties meeting established United States standards. He described a situation in which BWC was unable to match a standard for green shade type phthalocyanine blue, used in gravure ink, that had been established by DuPont. (Tr. 5351-52). He stated that BWC, using imported pigments, was rarely able to give a customer an economic incentive to change from an existing standard. (Tr. 5352–53). Mr. Aschner stated that BWC was unable to compete in the mainstream of the yellow business because it lacked the specific pigments or chemistry that was required. In yellows, BWC was "relegated to a relatively smaller portion in the area of specialty pigments or vat pigments." (Tr. 5358). In oranges, BWC was

not competitive from a technical standpoint, and certainly not competitive pricewise. (Tr. 5359–61). BWC could not compete against the domestic producers of violet organic pigments. (Tr. 5361–62). In reds, BWC was relatively insignificant because of economics and because of technical problems. (Tr. 5362–65). BWC's products "did not work the way that the master products worked." (Tr. 5364). In blues, BWC was small because of price competition, because of difficulties in meeting industry specifications and because its pigments did not always perform favorably in American systems. (Tr. 5365–66, 5372). In greens, BWC had many formulation problems. (Tr. 5366–70).

424. Dr. Josef F. Kohnle testified that BWC's difficulties in selling organic pigments in the United States lay in the problem of the right formulation and the right specifications and the difference between Europe and the United States pigments. (Tr. 4500–01). Dr. Kohnle also testified that BWC was not successful in reformulating because it took too long, and with the pigments manufactured in Ludwigshafen, one could not impress the United States marketplace very much anyway. (Tr. 4410–11).

425. Dr. Erich Stoeckl is employed by BASF AG, most recently as head of pigment production. (Tr. 5016–17). He testified that BASF AG's pigment production in Ludwigshafen is [***] (Stoeckl 5027). Dr. Stoeckl state that [***] (Tr. 5116–18).

426. Dr. Hahn testified that BWC had difficulty meeting United States standards (Tr. 3962–63), and that there were differences in [114]the vehicle systems and the fastness requirements (*e.g.*, weatherability) between the United States and Germany. (Tr. 3963–65, 3967, 4085–87). He stated that in 1973–1974, when BWC was considering building a plant to produce organic pigments, it would have had to modify many of its existing products to meet United States standards. (Tr. 3979–80). Dr. Hahn stated that BASF AG never made a systematic effort to develop products suitable especially for the United States users. (CX 5088Y).

427. Dr. Hahn also explained the difference in red pigments between the United States and Germany. In Europe, for process printing the standard red is a lithol rubine; in the United States, the cheaper lithol reds are the dominant color. (Tr. 3965–66). He also stated that there were differences in the characteristics of phthalocyanine, particularly green shade blue phthalocyanine, used in the United States and Europe, which hurt BWC's ability to sell these pigments in the United States. (Tr. 3966, 3970, 3973). *Also see* CX 629F; 718S(R); 908B.

428. Mr. Alsager testified that prior to the acquisition of CPD,

BWC sold pigments for use in coatings and a very small amount for use in plastics. The largest single purchaser by far of BWC's organic pigments intended for use in inks was Siegwerk, Inc., a BWC affiliate. Alsager testified that Siegwerk "was a German company using German technology and other Amerian companies were virtually excluded from that account." (Tr. 3609). Also the bulk of the activated pigments sold by BASF in the United States were sold to Siegwerk. (Hahn 4108).

429. Mr. Klaus Stammen, President of Seigwerk, Inc., appearing for complaint counsel, testified that his company's formulations were [***] (Tr. 2488). He also testified that his customers [***] (Tr. 2448–49). [***] (Stammen 2449–52; Muench 3928).

430. Dr. Hahn of BASF testified that there were instances when BWC did not have enough pigments on hand, requiring that shipments be rushed in by plane from West Germany. Dr. Hahn also testified that pigment shipments were sometimes delayed by dock strikes. (Tr. 3974–75). Dr. Josef F. Kohnle, discussing the period 1975–1978, stated that BWC was not considered a reliable supplier by United States customers. (Tr. 4402, 4404).

431. Mr. Sol Panush of Celanese Corporation testified that [***] **[115]**[***] (Tr. 2312–13, 2370–71).

(2) *BWC's Import Business Was Hurt By A High Tariff On Organic Pigments Competitive With Domestically Produced Pigments*

432. Mr. Muench of BASF testified that the tariff made importing organic pigments into the United States more difficult and that the effective tariff paid by BWC on imported organic pigments in 1978 averaged close to 30% of the market price of the organic pigments being sold in the United States by BWC. (Tr. 3794–96).

433. Dr. Hahn testified that high duties (in the 30% range) made BWC's import business unprofitable. (Tr. 3960). Dr. Kohnle, BWC's group vice-president, testified that the tariff rate is probably the single most important factor in explaining why BWC's business of importing pigments was unprofitable. He stated that the tariff for 95% of the organic pigments imported by BWC was 20% of the list price, and only 5% were specialties to which the lower tariff rate of 12.5% applied, and that since many sales were off-list, the effective tariff rate (for the period 1975–1978) was higher. (Kohnle 4403), 4411, 4501–02; Albers 6190).

434. Mr. Geiss of American Hoechst also testified that the tariff, [***] (Tr. 10,704–07, 10,725–26). Mr. Parker of ICI testified that in the past, the tariff represented a significant portion of the total selling price of the pigments. (Tr. 4953–55). Mr. Papillo of CIBA GEIGY also

testified that the high tariff made it harder for CIBA GEIGY to import conventional pigments, including phthalocyanines, profitably. (Tr. 1878).

435. Professor Markham, an expert witness for respondent, expressed an opinion that the high tariff was a factor which made exporting from Germany to the United States an unprofitable activity. (Tr. 7950–54). He also stated that organic pigment tariffs were among the highest he encountered and characterized them as "protectionists." (Tr. 8031–34).

436. [***] (CX 54B; 967BB; Muench 3939). *See* Stipulation Between Counsel **[116]**Concerning CX 9–43 and 2901–24. [***] (Geiss 10, 699–10,700).

437. Several witnesses, including those called by complaint counsel in their case-in-chief, testified that costs of producing organic pigment were higher in Germany than they were in the United States. (Papillo 1875–76; Geiss 2136, 2169).

438. To the extent the German costs were higher, these costs were reflected in the "CIF" (cost-insurance-freight) prices BASF charged BWC on imported organic pigments (Aschner 5340–41, 5343, 5356–57). The CIF price on each product imported was the transfer price between BASF AG and BWC, and thus established the minimum selling price for BWC in the United States. (Aschner 5340–41). Mr. Aschner testified that the CIF prices often increased due to the declining value of dollars and the higher costs in Germany. (Tr. 5356–57). He stated that "[w]e were literally in a vise" between higher BASF AG costs and price competition in the United States. (Tr. 5357).

439. Several officials of BASF also testified about personnel and raw material price increases in Germany during the period 1975–1978. They stated that a leap in labor costs in Germany may have taken place during the period 1976–1977. They stated that raw materials and labor costs are more expensive in Germany than they are in the United States. (Hahn 3974; Kohnle 4402, 4404, 4498). Dr. Hans Albers, a member of BASF's Vorstand, testified that BASF experienced unsatisfactory export results in part because of rising labor costs, energy costs and raw materials costs in Germany. (Tr. 6184–85).

440. Mr. Geiss of American Hoechst testified that, prior to its acquisition of CPD, BWC was [***] (Tr. 2169, 10,703, 10,726). Mr. Papillo of CIBA-GEIGY testified that CIBA-GEIGY, prior to its acquisition of Hercules, faced the same problems as did BWC. (Tr. 1875–76).

441. Professor Jesse W. Markham, respondent's expert witness,

expressed an opinion that BASF was suffering because of its problems with exchange rates, a high tariff and high German labor costs. (Tr. 7949). Professor Markham also testified that higher production costs in Germany made exporting organic pigments to the United States more difficult. (Tr. 7950). He found German raw material costs to be higher than United States raw material costs. (Tr. 7994–96). In his opinion, the oil price rise had a more severe impact on German raw material prices than on United States raw material prices. [117](Markham 7995). He also gave an opinion that labor costs in Germany were generally higher than for the United States for the period from 1972 on, as were utility costs and capital costs. (Tr. 8004, 8014–16, 8021–22).

442. Mr. Muench, director of BASF's Sparte CP, testified that BWC would sometimes seek a price concession from Sparte CP in Germany. Sparte UN (the division in charge of BASF's North American operations) would submit a request to Sparte CP explaining why it required a lower transfer price. (Tr. 3926). This would then be examined by the management and the request would either be approved or rejected. (Tr. 3791).

443. Dr. Kohnle of BWC testified that RX 8003 (admitted into evidence as CX 251) illustrates BWC's attempts to obtain [***] (Tr. 4424). [***] (Tr. 4425). *Also see* CX 251; 721; 762; 1254–55; 1262C). [***]

444. Several officials of BASF/BWC also testified that the declining dollar value against the DM hurt BWC's organic pigments import business. (Hahn 3949–55, 3974, 4008–09; Kohnle 4401–02; Aschner 5355; Albers 6183–84; Muench 2136). *Also see* CX 152F; 165A; 702E; 741A.

445. Mr. Geiss of American Hoechst testified that [***] (Tr. 2169, 10,703, 10,726). Mr. Papillo of CIBA-GEIGY also testified that, prior to CIBA-GEIGY's acquisition of Hercules, it was difficult to import because of the exchange rate and the strengthening of the Swiss franc vis-a-vis the dollar. (Tr. 1875–76).

446. Professor Markham, respondent's expert witness, expressed an opinion that the decline of the dollar vis-a-vis the deutsche mark made exporting to the United States a money-losing activity. (Tr. 7951–54).

447. Because almost all of BASF's organic pigment sales in the United States were products imported from West Germany, the decline in the value of the dollar relative to the deutsche mark adversely affected BASF's ability to export pigments to the United States and BWC's ability to sell its imports profitably. (CPF 473). [118]

D. *Incentives For BASF/BWC Expansion In The United States*

(1) *Attractiveness Of The United States Market*

448. BASF was committed at the highest levels of its organization to become a major factor in the United States organic pigments market. (Stoeckl 5035; Hahn dep. CX 5088FF–KK; CX 902A). As a leader in the manufacture of dyes and pigments, BASF's strategy was "to create a worldwide market for its dyestuff and pigment know-how and to gain a commensurate share of the United States market." (CX 960A). BASF considered its share of the United States organic pigments market to be "an obvious underrepresentation." (CX 960C).

449. The United States organic pigments market is the largest in the world, representing approximately 28% of the world's consumption of organic pigments. (CX 754A; 955F; 1802; Geiss 2073). It represents a source of development for new products and applications that affect the worldwide market for pigments. (Muench dep. CX 5092R–T; Puff dep. CX 5094EE; CX 956C). During the 1970s, the organic pigments market in the United States grew at a rate greater than the G.N.P.'s. (CX 166CC; 186A; 212Q; 221C–D; 247F; 702C, O; 960A; 2042KK–LL).

450. The tariff imposed on imported organic pigments adversely affected BASF's ability to import pigments into the United States. The declining value of the United States dollar in relation to the deutsche mark also offered an economic incentive to BASF to establish organic pigments manufacturing capability in the United States. During the 1970s, the cost of manufacturing organic pigments in West Germany increased substantially. The landed cost which BWC paid to BASF for its organic pigment imports was set in West Germany. Because BASF's manufacturing costs were increasing, BWC had difficulty obtaining price concessions on imported pigments from BASF. (CPF 478–80). *See* F. 432–47, *supra.*

451. BASF recognized the economic advantages that could be derived by establishing a United States organic pigment production facility. BASF and BWC realized that domestic production facilities would significantly enhance their penetration of the United States market. (CX 155A; 182E; 187DD–EE; 203F; 247F; 631A–B; 702E; Hahn 3976; 4008–09; Albers 6259–60).

452. Because of the close relationship between dyestuffs intermediates and organic pigments intermediates, there are [119]advantages in establishing an integrated facility. (CX 563E; 564B–E; 568A–D; 570G; 580; Geiss 2060; Stoeckl 5025–27).

453. In 1978, BASF acquired ownership of Dow Badische Corporation. (RA 146). Dow Badische consumes organic pigments in its

production of fibers. (RA 146). In 1980, BASF acquired a partial interest in Cook Paint & Varnish, one of the six largest coatings manufacturers in the United States. (RX 6602C; CX 932; Albers 6261–64; 6270).

(2) *BASF/BWC's Expansion Capabilities In The United States*

454. BASF has the financial and technological resources to expand its organic pigments business in the United States. BASF has made and contemplates making substantial investments in chemical-related manufacturing facilities in the United States. (CX 52B–E; 6020; Albers 6269–70; Mecke 4328–29). BASF has increased its participation in the dyestuffs, inorganic pigments, and other chemical-related businesses through construction of domestic production facilities in the United States. (RA 147–52; CX 222J; 556B; 602D; Albers 6267–69; Mecke 4329–30).

455. BASF's market entry strategy contemplated a two-step process: establishment of a business based upon imported products followed by construction of local manufacturing facilities when the volume of business was sufficient to support a plant. (Kohnle dep. CX 5091Q–U; Hahn dep. CX 5088GG–HH; CX 155A; 161K; 199B). This strategy sometimes required BASF to sustain losses on the business until the domestic production facilities could be established. (Kohnle dep. CX 5091H–K; Lipton 1602–03; Whittemore 1966–70).

456. BASF had well defined procedures for transfers of technology from BASF to BWC and for construction of manufacturing facilities utilizing BASF technology. [***] (CX 64; 65; 216F–G; 556; 583E–F; Hahn dep. CX 5089F–K). During the period 1970–1980, BASF transferred significant organic pigment production technology to BWC, particularly between 1976 and 1979 and in conjunction with the planning for organic pigment production at the Rensselaer site. (Int. (II) 6).

457. BASF's Technical Services Department (CPE) coordinated the research and development related to the United States organic [120]pigments market. (Bock dep. CX 5085L–M; Bock 3464–65). CPE was continually apprised of technical developments in the United States organic pigments market (Bock dep. CX 5085O–R), and received results of BWC's tests on BASF's products. (Bock dep. CX 5085O–Q). BWC transmitted to BASF "Annual Technical Reports" which detailed both competitive activity in the United States market and BWC's performance for the year. (CX 706; 708; 715; 723; 785). CPE was responsible for evaluating products of United States competitors against BASF's. (Buff dep. CX 5094L–N).

458. CPE regularly sent samples of BASF developments to BWC that it thought would be of interest to the United States market.

(Bock dep. CX 5085Q–S; Bock 3470). The samples ("E" or "SF" products) were tested in Ludwigshafen and at BWC before they were offered to customers for testing in the United States. (Bock 3470–71; Aschner 5414–15). BASF was also engaged in a research and development effort specifically for the United States organic pigments market, [***] (CX 212P; 213J–K; 722A–F; 737; 741; 744; 745B–C; 759; 1951A; Bock 3475–80; Bock dep. CX 5085S; Hahn dep. CX 5088V–Z).

459. There has been substantial interaction between the Technical Service Department at BASF and the technical service personnel at BWC. (Bock 3464–65). For example, Dr. Erwin Hahn, the director of BASF's central research laboratory, was formerly the General Manager of the Colors and Auxiliaries Division of BWC. Gunter Kirchmer, who is the leader of BASF's "Market Opening Group - Pigments and Dyestuffs" and is responsible for worldwide introduction of new pigment products (CX 61), was formerly the Technical Service Manager of BWC's PIC Department. (Bock 3463–64). BASF Technical Service personnel were often sent to the United States to visit BWC's customers and competitors in order to identify areas of product development or application trends that could be pursued or introduced into the United States market. (Bock 3475–77; Puff dep. CX 5094CC–EE; CX 702; 704; 727; 731).

460. In order to capitalize on BASF's position in phthalo pigments in the United States, BASF and BWC developed a "phthalocyanine strategy" for the United States market. (CX 723W–CC). This concept envisioned the development of a new product by BASF and an increased marketing effort by BWC to generate a sufficient volume of sales to justify construction of a domestic organic pigment manufacturing facility. (CX 214D; 221R; 222Z; 227F–G; 714; 716; 717E–O; 722A–G; 737; 741F–G; 744A; 768I–J, S; Bock 3478; Aschner 5501–02, 5499–5501, 5442–45). [121]

461. BWC's sales of phthalocyanine pigments in the United States increased substantially on a poundage and value basis from 1970 through 1978:

Year	Pounds	Value
1970	486,000	$1,285,000
1971	516,000	1,258,000
1972	670,000	1,768,000
1973	713,000	2,183,000
1974	611,460	2,820,735
1975	362,613	1,898,404
1976	823,602	4,476,603
1977	[***]	[***]
1978	[***]	[***]

(RA 138; CX 1704). *See also* CX 230C; 233C; 234B; 235B; 285G; 706J–K; 708L–O).

462. In conjunction with its "phthalocyanine strategy," BASF developed "activated pigments." (CX 752A; 743U, FF; Bock 3477). Activated products, patented by BASF (Smith 1548–49), were promoted in competition with finished organic pigments. (CX 240B). The activated pigments sold by BWC in the United States market are Paliofast Blues 7060 T, 7228 I, 7160 TD, and 716 TP, which are all phthalocyanine blues. (CX 9B; Aschner 5447–48, 5481–82). BASF was also pursuing the development of activated forms of other organic pigments and new types of activated phthalocyanines for introduction into the United States market. (CX 713A; 741B–C; 743F, L, U, FF; 745C; 750; 752; 753; 768D–F; 794; 798; Hahn 4107).

463. BASF also developed organic pigments to replace chrome and lead-based inorganic pigments in the United States. (Hahn dep. CX 5089S–V; Bock dep. CX 5086B–D; CX 203E; 204B; 212P; 213J–K; 214E; 227O; 704J–M; 723MMM–PPP; 768G–H; 1082F–G; 1153A–B, K–N; 1155; 1157; 1158). They include Paliotol Yellow 2140 HD and 0960 HD, which are isoindoline and quinophthalone pigments respectively. (CX 1082G; 1083F; 1702J; Aschner 5476–78). BASF's isoindolines were regarded by the industry as a significant advancement and technical innovation (Geiss 2073–74; Papillo 1838–38A; Smith 1476), and were introduced at [***] (CX 777), Ford (CX 771D), and [***] (CX 772). BASF's quinophthalone pigments were also recognized as a significant advancement (CX 3102), and BASF is in the process of commercializing a variety of Paliotol pigments of different chemical types in the United States. (CX 106; 108; 109; 6003).

464. BASF and BWC prepared one-year and five-year plans on an annual basis. (Kohnle dep. CX 5090I–L). BWC's plans were **[122]** incorporated into Sparte UN's plans, which were approved by BASF's Board of Directors ("Vorstand"). (Kohnle dep. CX 5090I–L). Sparte CP, which was responsible for BASF's worldwide organic pigments business, reviewed BWC's pigments-related plans to insure that they were coordinated with Sparte CP's plans and objectives. (Muench dep. CX 5092N–O; Meunch 3859–60, 3781–84).

465. BASF set a limit on the amount Sparte CP, Sparte UN, or BWC could budget for capital investments. (Albers 6252–53; Kohnle dep. CX 5090N–P). The inclusion of a project in a five-year plan allowed the appropriate division to expend a limited sum of money to develop necessary engineering concepts and market studies. (Kohnle dep. CX 5090N–P; Albers 6180–81). Projects incorporated in approved five-year plans represented areas of interest or "wishful

thinking" (Muench 3857–63). After a project was incorporated in a five-year plan, it had to go through a formal approval process called "Project Definition" before the project was formally authorized. (CX 65; Kohnle 4390–94; Albers 6169; Muench 3777–78; Mecke 4165–69).

(3) *BASF's Internal Expansion Projects In The United States (1971–1978)*

(a) Operation Presscake—South Kearny Pilot Plant

466. In 1971, BWC installed a pilot plant at South Kearny, New Jersey, consisting of two filter presses and a salt grinder. (Kohnle 4492–93). It was designed to give BWC greater expertise in the production of phthalocyanine using the salt kneading process and to sell the products in the United States. Although phthalo presscake produced from the plant was of commercial quality and was sold to customers, it was closed in October 1977 [***] (RX 4059F; CX 175B; 213F; 215F; 225J; 226H–J; 608; 610; 627; 630; Hahn 3970–72, 4118; Kohnle 4420–22, 4492–93; Aschner 5342–46; Albers 6204–05).

(b) API Project

467. BASF realized that in order to increase its share of the United States market, it needed to establish domestic manufacturing facilities and began planning for construction of an integrated plant **[123]**for azo dyestuffs, pigments, and intermediates ("API") in 1973. After the preparation of detailed market studies, product assortment lists, site selection criteria, engineering plans, and cost calculations, BWC prepared a Request for Project Definition for API and submitted it to BASF on October 30, 1974. (RX 2812; CX 567, 587–96, 602; Hahn 3978–88, 3997–99). The estimated cost of the project was more than [***] million. (Hahn 3993–94, 4404–06). BWC spent more than [***] in the engineering and planning work leading to the Request for Project Definition. (CX 183K). But the API project never reached Commission S, the BASF unit responsible for screening capital investment proposals for the Vorstand. (RX 2003, 2074; 2812; CX 579B–C; 902A; Hahn 4012–13; Mecke 4174–77, 4188-94; Albers 6191–6206).

468. Dr. Morris Adelman, respondent's expert witness, expressed an opinion that, based on his analysis of the API project, BASF AG could not have entered the industry on a *de novo* basis. He testified that his calculations based on the same data used by BASF AG in coming to their decision showed API had a negative present value at any reasonable discount rate. (RX 2074; Adelman 10,093–97). Moreover, many of the assumptions on which RX 2074 was based and as used by BASF AG were unrealistically optimistic. (Tr. 10,112–17). He concluded that under realistic assumptions, the API project

"did not even come close to being viable under 1974 conditions . . . ." (Tr. 10,118–20).

(c) Rensselaer Pigment Facility

469. In March 1978, BWC acquired a colorants manufacturing facility (primarily dyes) located at Rensselaer, New York, from the GAF Corp. (RA 133; CX 1008). [***] (CX 1008A–G). GAF was at one time a supplier of phthalocyanines and its technology was considered to be of value. (Canon 12,542–43). BASF re-acquired its "Heliogen" trademark for use in the United States when it purchased the "Rensselaer Color Business." The Heliogen trademark, which is BASF's worldwide trademark for phthalocyanine pigments, had not been used by BASF in the United States before the GAF acquisition because it had been expropriated by the United States Government at the end of World War II. Since the Rensselaer acquisition from GAF, BASF switched its [124]phthalocyanine nomenclature in the United States back to Heliogen. (RA 129–35; CX 109; Hahn dep. CX 5088MM–OO).

470. One of the justifications offered by BWC and Sparte CP for the Rensselaer acquisition was that it would provide a site for any future expansion for the colors and auxiliaries division, *i.e.,* pigment production. (CX 1003B; 1004C; 1005M; Albers 6271; Kohnle 4504–09). [***] (CX 1001A; 1004C; Stoeckl 5086–88). [***] (CX 1020D).

471. In July 1978, Dr. Albers, a member of Vorstand of BASF AG, and Mr. Muench, the Director of Sparte CP, visited BWC and the Rensselaer site. (Albers 6271–72; Muench 3807–08, 3911–12). On July 24, 1978, in a memorandum summarizing the results of this visit, Mr. Muench stated in part: [***] (CX 920A). [***] (CX 920B). In September, at the direction of Dr. Albers and Mr. Muench, Dr. Stoeckl visited Rensselaer and concluded that [***] (CX 1014C). He recommended that BASF pursue both organic pigment production at Rensselaer and the acquisition of a United States manufacturer of flushed organic pigments. (CX 778E; 1014C; Albers 6273–75; Stoeckl 5019–24; Muench 3916). Some organic pigments were produced at Rensselaer (sold as catalysts by GAF) prior to its acquisition by BWC (RA 136), and there was room for expansion at the site. (RA 137; Lindenauer 7505–06, 7523; Kohnle 4440–42). [125]

472. Subsequent to the visit of Dr. Stoeckl, [***] (CX 1011; 1019; Stoeckl 5088–90), [***] (CX 1012). [***] (Stoeckl 5068–69) [***] (CX 1015A–B). *Cf.,* Kohnle dep. CX 5090S–V; Muench 3938–39; Stoeckl 5025–27, 5038–44, 5084–86, 5135–40.

473. In early November 1978, while BASF was negotiating for the possible acquisition of [***], BWC submitted a [***] (CX 1020Y; Kohnle 4510–18).

474. During the trial, Dr. Erich Stoeckl, head of the production department of Sparte CP, testified that [***] (Stoeckl 5022–24).

475. Referring to a recommendation that [***] (CX 1015B(R); Stoeckl 5026–27, 5086).

476. There was also some discussion about producing [***] Dr. Stoeckl concluded that [***] (RX 2843B; Stoeckl 5046–51, 5054). Dr. Stoeckl also testified [***] **[126]**[***] (Lindenauer 7502–03).

477. Dr. Stoeckl testified that [***] (Stoeckl 5083).

478. Regarding the so-called "Rensselaer Alternative," a proposal to build new facilities for alkali blue, C-Amine and azo pigments at Rensselaer, Dr. Kohnle testified that for this purpose completely new equipment had to be installed in new buildings and that the meagre projected profitability did not justify such an investment. (CX 1020; Kohnle 4558–60).

479. Mr. Muench, head of Sparte CP, who was primarily responsible for deciding whether an organic pigment plant should be added to Rensselaer, generally corroborated the testimony of Dr. Stoeckl and Dr. Kohnle regarding the Rensselaer pigment facility project. Mr. Muench testified that [***] (Tr. 3818–19). He testified that subsequently he [***] (Tr. 3816–18). *Also see* Albers 6210–21, 6248–49.

480. On December 7, 1978, Dr. Schroedel [***] (CX 1021A).

481. At the present time, one pigment (MOLORA red) is produced at Rensselaer. (CX 241CC, EE, HH; 273E; 1016; 1017F; 1018; 3818–20; Muench 3921–24; Kohnle dep. CX 5091B–D, N–O; Kohnle 4444–48). BWC officials testified that the transfer of MOLORA Red (formerly a CPD trademarked organic pigment) from the Huntington plant to Rensselaer was necessitated by [***] MOLORA Red operations at Rensselaer are said to be [***] (Kohnle 4444–48).

482. In 1981, BWC considered several alternatives for the integration of CPD's pigment production facilities at Huntington and Holland. (CX 657–63). One such alternative provided for the transfer of [***] (CX 657E). **[127]**

(d) Project U.S.A.

483. Earler in 1977, shortly after BWC's S. Kearney pilot plant was closed, BASF and BWC began to explore the construction of a phthalocyanine plant in the United States. (Kohnle 4426–31; Muench 3886–88). [***] (CX 631). [***] (CX 953). After a flurry of activity during February and March 1978, the plan languished because of uncertain economic prospects and increasing activity on the acquisition front.

484. Planning for the phthalocyanine plant (referred to as "Pigment Finish" or "Project U.S.A."), advanced through [***] (CX

632–35; 637; Muench 3893–94). [***] (RX 4099; CX 639; Bock 3401–03).

485. [***]

486. [***] [128][***]

487. Dr. Hans Albers, a member of BASF's Vorstand and Resource C, generally corroborated Mr. Muench. He testified that the Project U.S.A. was rejected because its estimated BBE II (GOR II) of 6.2% was too low to justify the project. (Albers 6202–03). He also testified that he did not believe the sales forecasts used to justify the Project were realistic. (Albers 6206). *Also see* CX 955B, F; 956A.

488. Dr. Adelman, respondent's expert witness, agreed with BASF's analysis that Project U.S.A. was not economically worthwhile. On the basis of his net present value ("NPV") analyses of the project data (RX 2303), he gave an opinion that Project U.S.A. was a "nonstarter," like API, with negative net present value (Tr. 10,127–28), and concluded that the Project U.S.A. was not a viable option for BASF. (Tr. 10,134–36).

E. *Acquisition Efforts of BASF In The United States During The 1970's Leading To The CPD Acquisition*

489. BASF had an established procedure governing the consideration and evaluation of acquisition candidates. This procedure required the submission of "Expertise", documents which analyze the nature of the acquisition candidate's business, its relationship to BASF and BASF's strategies, and economic profitability to Commission F, which then made a recommendation for approval or disapproval to BASF's Vorstand (Board of Directors). (Muench 3788–90; Kohnle dep. CX 5090Q–R). Between 1972 and 1979 (when BWC acquired CPD) BASF considered several United States organic pigment producers as candidates for acquisition.

490. In 1972, BWC investigated the possibility of acquiring GAF Corporation's organic pigment plant in Linden, New Jersey, and decided against it. (Hahn 3976–77).

491. In 1976, BWC and BASF considered the acquisition of Harmon Colors Corp. from Allied Chemical. Harmon was sold to Bayer AG, in early 1977, (CX 908–12; Albers 6236).

492. In July 1977, BASF considered the acquisition of Inmont, but rejected the idea based upon Mr. Muench's advice. (CX 916; Muench dep. CX 50930–P). [129]

493. In late 1977 and early 1978, BASF considered the acquisition of the pigments and intermediate products business of [***] (CX 913–15; Muench 3895–96; 3931–32).

494. On February 23, 1978 [***] (RA 118). During April and May 1978, BWC engaged in negotiations with Allegheny Ludlum Indus-

tries for the acquisition of CPD. (RA 119–20; CX 953–59; Muench 3901–03; 3906–08). On [***], Commission F recommended to Vorstand the purchase of CPD for [***] million. (RA 121; CX 960–63). Commission F stated that the purchase price was justified [***] (CX 963H).

495. On June 12, 1978, Allegheny Ludlum Industries announced that it had agreed in principle to sell CPD to Rhinechem Corporation, a subsidiary of Bayer AG, for about $49.5 million. (RA 123). On October 20, 1978, the acquisition of CPD by Bayer was temporarily enjoined by the United States District Court for the Northern District of Illinois upon a petition filed by the FTC. (RA 124–26).

496. After its May-June 1978 bids to purchase CPD failed (RA 117–24), BASF turned [***] (CX 918; 1011–12; 1014; 1020). *Also see* F. 469–80, *supra.* [***] (Muench 3911; CX 918–19). These various options, and the CPD acquisition, were all considered and evaluated in the context of BASF's desire to achieve a market position in the United States commensurate with BASF's worldwide position, to establish a domestic organic pigments manufacturing facility in the United States, to avoid the time and effort of building up a market share, to avoid adding production capacity, and to realize higher prices and profits. (CX 920; 922; 952F; 953A; 955B, 956A).

497. In July 1978, when Dr. Albers and Mr. Muench visited BWC, Mr. Muench recommended that BWC begin the preparation of Expertise I concerning Hilton-Davis and commence planning for organic pigments production at Rensselaer. (CX 920; Albers 6271–73). On July 21, 1978, BWC submitted Expertise I regarding the acquisition of Hilton-Davis to Dr. Minsinger, head of Sparte UN and a member of the BASF [130]board (CX 921), and about a month later an Expertise regarding the acquisition of a pigment manufacturer, covering Hilton-Davis, DuPont, Sun, and Magruder, was submitted to Commission F by Sparte CP and Sparte UN. (CX 922; Muench 3826–34). Commission F authorized negotiations with Sterling Drug for the acquisition of Hilton-Davis, a course favored by Mr. Muench at the time. (CX 923–24; Muench 3914–15; Muench dep. CX 5093N; Albers 627–79).

498. On October 12, 1978, in the 1979–83 Operating Plan of Sparte CP, Director Muench stated: [***] (CX 293B).

499. In October 1978, BWC began negotiations [***] (CX 969D).

500. When CPD became available again after the court injunction in late October 1978, BWC renewed its bid for CPD. (CX 929; 968). In a memorandum dated November 1, 1978, BWC noted: [***] (CX 929B). BWC's negotiations with Allegheny Ludlum Industries and [***] appear to have been concurrent. (CX 969–70). On November

17, 1978, nine days after the last recorded meeting between BWC and [***] (CX 390), BASF and Allegheny Ludlum Industries executed an agreement for the purchase of CPD by BWC. (RA 127).

501. Regarding BASF's acquisition efforts during 1978, Dr. Albers, a member of BASF's Vorstand, testified at the hearing **[131]** that [***] Regarding CX 922, Expertise I on the acquisition of a pigment manufacturer in the United States including [***], Dr. Albers testified that [***] (Albers, 6230–32). *See also* RX 4031.

502. Dr. Albers also discussed RX 4044 and RX 4054 regarding the possible acquisition of [***] (Tr. 6240–41). Dr. Albers testified that at the time BWC contracted to acquire CPD, in November 1978, he did not believe that there were other alternatives open to BWC. (Tr. 6242–43). *See also* RX 4059J.

503. Dr. Albers summarized the reasons why the Vorstand of BASF AG favored the acquisition of CPD:

> We knew Chemetron already a lot of years as a competitor with very strong market penetration and a good product line, a product line which was able to supplement our own product line in organic pigments and would in addition to that give us access to the processes used in the United States in the printing ink industry starting from flushed colors . . . . It would also give us domestic manufacture facilities . . . .

(Tr. 6224).

504. Dr. Kohnle of BWC testified that the acquisition of CPD would give BWC a domestic facility to manufacture pigments, a strong marketing and sales force and flushing technology. (Tr. 4453–55). **[132]**

505. The following documents in evidence, also describe the advantages of the CPD acquisition as perceived by BWC: CX 964A [***] CX 957C [***] RX 4065D [***] CX 903G. [***] CX 967EE–FF [***]

506. At the time of the acquisition, BASF management estimated the additional investment needed to make CPD operational at $11–17 million. Dr. Mecke of Sparte CP's economic evaluation division, together with some members of his team from BWC and BASF AG, participated in a survey of CPD's facilities in May, 1978. (Tr. 4215–19). He testified that the team's work was rushed because their superiors wanted to have their report at a specified time in order to make a decision regarding the acquisition, particularly because of the presence of other companies interested in acquiring CPD. The time he spent analyzing the CPD acquisition was two weeks, relying on information provided to him by CPD. (Tr. 4217–18, 4221, 4225, 4229–30).

507. Dr. Hahn of BASF also testified that prior to the acquisition of CPD, BWC anticipated a total additional investment of $17

million, based on estimates contained in CPD's five-year plans which BWC took at face value. (Tr. 4021–23). BWC did not have time to do much checking because ALI required a quick decision inasmuch as other companies had expressed interest in acquiring CPD. (Tr. 4018).

508. Dr. Kohnle of BWC testified that CPD initially thought that $11 million for mandatory capital investments and $6 million for minor debottlenecking and expansion would be needed for CPD. (Tr. 4456). *Also see* Muench 3840; Albers 6224–25.

509. Dr. Mecke stated that his analysis (CX 967) showed CPD to be a profitable corporation (Tr. 4227) and a favorable profit picture for the five-year period following the acquisition, 1978–1982. Dr. Albers testified that it was felt that within three years BWC would be able to cover its necessary investment of $11 million, interest on its loans and would make a profit. (Tr. 6245). Mr. Muench testified that [***] (Tr. 3934). [***] [133][***]

510. After the acquisition of CPD, a combined BASF/BWC task force investigated the capital needs of Huntington and Holland plants in detail and discovered that the original estimate made prior to the acquisition was not adequate. (CX 659; Kohnle 4457–58).

511. Mr. Muench, head of Sparte CP, testified that it became clear to him that [***] (Muench 3843–44).

512. Dr. Albers of BASF's Vorstand also testified that a post-acquisition study team came up with a much higher capital estimate than had been projected, primarily because of the conditions discovered at the Huntington plant. (Albers 6225). He stated that there have been capital expenditure proposals in the range of $60 million to $100 million and that in his view this is an amount BWC can never consider for the purpose of rehabilitating the acquired facilities. (Albers 6226).

F. *Other Firms In The Organic Pigment Market*

513. The following firms are generally recognized as worldwide leaders in organic pigments: Hoechst AG, Bayer AG, BASF AG, CIBA-GEIBY Limited, ICI, DuPont, Sun, Sandoz, Dainippon, Dainichiseika and Toyo. (Schober 1667; Wittemore 1990–91; Geiss 2074–75; Parker 4969).

514. In the United States organic pigment market, the member firms fall within one of three subgroups, depending upon such factors as the history, market share, the scope and depth of product line, product quality, technological and marketing capabilities and financial resources of each firm. At the time of the acquisition challenged herein, the upper-tier firms included Sun Chemical, DuPont, CPD, American Hoechst, and CIBA-GEIGY; the second or middle-tier firms included American Cyanamid, Harmon Colors,

Hilton-Davis and Hercules; and the lower-tier firms included BWC and other remaining smaller firms. (Schober 1667). More often than not, the [134]market studies and strategy documents in evidence discuss the activities and plans of these firms. They generally regard themselves as the significant competitors in the organic pigment market. (*E.g.,* CX 212Y–AA; 272M; 2047K–L; 3010FFF–LLL; 3106B–EEE; 3215L–P; 3302B–C; 3418W–AA). *Also see* CX 1968T–U. BWC is generally considered a small factor in terms of sales. However, because BASF/BWC is considered a world leader, it is discussed often in market studies and strategy documents of the industry firms. (CX's 2036G; 3223H).

515. There are also a number of smaller but fast-growing firms in the organic pigment market. They include Magruder Color Company, Inc., Harshaw Chemical Co., Ridgway Color and Chemical Co., Apollo Colors, Inc., Pope Chemical and others. Their organic pigment sales are less than $10 million, accounting for about 2–3% of the industry sales. (CX 1; 3010TTT, UUU, AAAA; 3418Z–AA; 3106J, L, S, AA–CC). Also, their product lines are smaller than those of the larger firms and most of them specialize in the printing ink end-use segment of the industry. F. 556–69, *infra.*

516. Many industry firms occupy somewhat specialized positions within the industry in terms of the pigment product forms they sell and the end-use industries they serve. The most striking example is the group of firms which sell almost exclusively or predominantly flushed pigments to the printing ink industry. This group includes CPD, Hilton-Davis, Magruder, Apollo and Pope. Another group of firms have strong positions in specialty or high-performance pigments and sell primarily to the automobile coating and plastics industries. That group includes DuPont, American Hoechst, CIBA-GEIGY, Harmon and BWC. F. 524–69, *infra.*

517. Some competitors in the organic pigments market also have leading positions in particular pigments. (CX 3007T (schematic diagram); 3609I). DuPont leads in the production and sale of quinacridones and alpha-type phthalocyanines. Sun Chemical is the leader in diarylides and, with DuPont, shares the lead in beta-type phthalocyanines. (Whittemore 1943–44). American Cyanamid leads in lithol reds. (McKenzie 3415B, 6943–44). Chemetron leads in alkali blue and C-Amine based azo reds. (CX 2052C, L–M). Harmon leads in perylene pigments. (CX 785F; 910C–D). Hoechst is recognized as the leader in hansa yellow pigments.

518. Testifying as complaint counsel's expert witness on rebuttal, Dr. David Kamerschen, Distinguished Professor of Economics at the University of Georgia and a noted industrial organization economist,

stated that the organic pigments market is divided into two separate and identifiable groups of competitors, major or upper-echelon companies and minor or lower-echelon firms. These groups are distinguishable based upon the following characteristics: the size and capital base of the company; market share; production capabilities; research and development commitment; marketing [135]organization and coverage; breadth and quality of the product line; vertical integration; and experience in the field of organic pigments or related colorants. (Kamerschen 11,089–90). The major or upper-echelon firms in the organic pigments market at the time of the acquisition were: Sun Chemical, DuPont, American Hoechst, CPD, American Cyanamid, CIBA-GEIGY (including Hercules), Harmon (subsidiary of Rhinechem Corp., which is a subsidiary of Bayer AG) and Hilton-Davis (a division of Sterling Drug Inc.). Regarding BWC, Dr. Kamerschen stated that, although BWC was a lower-echelon firm in terms of market share, it possessed the characteristics of an upper-echelon firm because it is owned by BASF AG, a recognized world leader in dyestuffs and pigments. (Kamerschen 11,098–99).

(1) *Sun Chemical Co.*

519. In 1977, Sun Chemical Co. was the top-ranking firm in the organic pigment market with sales in excess of [***] and a [***] market share. (CX 1). It also ranked first in phthalocyanine pigments. (CX 3). Sun Chemical is one of the three United States organic pigment manufacturers (the other two being DuPont and CPD) that have exported pigment products to Europe. (CX 704DD; 769III; 3004M; 3882B).

520. As of 1977, Sun Chemical manufactured both specialty and conventional organic pigments, including the following chemical types: hansa yellows, diarylide yellows, dinitraniline orange, pyrazolone oranges and red, toluidine reds, Red 2B, lithol reds, BON reds, lithol rubines, BON Maroons, rhodamines, quinacridones, carbazole dioxazines, pigment scarlet, phthalocyanine blues and phthalocyanine greens. In all, Sun manufactured more than 34 different types of organic pigments. (Whittemore 1911–12; Stipulation dated January 4, 1982, Exhibit 1, at 17–18). Sun is generally considered to have one of the broadest product lines in the organic pigments industry (CX 212Y; 3004M; Malchick 3080–81) and is a recognized leader in beta phthalocyanine blues, diarylide yellows, hansa yellows and azo reds (*e.g.*, BON, Red 2B, lithol and red lake C). (CX 3418X; Whittemore 1943–44). Sun is the leading producer of flushed pigments (CX 1958T; 3302B; 3418X) and also sells pigments in dry form and in aqueous dispersions. (CX 2047K; 3010LLL; 3801K; 3418X; Whittemore 1911–12).

521. Sun Chemical's domestic organic pigment manufacturing facilities are located in Rosebank, New York (for azo and phthalocyanine pigments); Newark, New Jersey (for perylenes and quinacridones); Cincinnati, Ohio (for azos, carbazole violets, and phthalocyanines); and Muskegon, Michigan (for diarylide yellows). (CX 922F; 3216J–K). The facility at Muskegon cost about $12 million and commenced production of diarylide pigments in December 1978. (Whittemore 1914; 1916). Sun Chemical is known for its efficient, **[136]**large scale production of conventional pigments which are sold at competitive prices.

522. Sun Chemical has a large, aggressive, national sales force (CX 1958T; 2047L; 3004M; 3010LLL; 3302B), and markets its products primarily to the printing inks industry, but also to the automotive coatings and plastics industries. (CX 2047L; 3010LLL; 3302B; Panush 2252). Although Sun purchases all of its intermediates (CX 2047K–L; 3010LLL; 3121; 3215L; 3302B), it is forward integrated. Sun owns General Printing Ink ("GPI"), a large worldwide producer of printing inks. (CX 922E; Whittemore 1910–11). GPI is a large consumer of Sun's organic pigment products. (CX 922E; 2047L; 3004M; 3302B; 3418X).

523. Sun Chemical's research and development expenditures have increased steadily from 1975 through 1979. In 1978, Sun spent more than [***] million on research and development. (CX 3120). The research and development department works on product synthesis new to Sun's line, and analyzes competitive products and modifies or improves existing products. (Smith 1293–94; 1444–45). It is organized into [***] (Smith 1438–39). Although Sun engages in research related to the development of new chemical structures, it has [***] (Smith 1442–43). Sun has been successful in developing and commercially introducing specialty organic pigments, [***], which were new to Sun's product line, and is recognized as having excellent technical capability and product quality. (CX 272M; 1958T; 2047K–L; 3004M; 3801K; Smith 1443–44).

(2) *DuPont*

524. DuPont, which had worldwide sales of approximately $10.6 billion in 1978, manufactures and sells organic pigments through its Colored Pigments Division. (Lipton 1592–93; Stipulation dated February 10, 1982). In 1977, DuPont was the second ranking firm in the United States organic pigment market, with sales in excess of [***] and accounted for about [***] of the market. (CX 1). It also ranked second in phthalocyanines, with sales of more than [***] million and a share of [***] (CX 3). It is one of the three domestic organic pigment manufacturers that exports organic pigments to

Europe. (CX 769III). DuPont also manufactures inorganic pigments and dyestuffs. (CX 588D–E; 3010JJJ).

525. In 1977, DuPont manufactured specialty and conventional organic pigments, including the following chemical types: hansa yellows, quinacridones, naphthol reds, toluidine reds, Red 2B, BON [137]reds, lithol rubines, rhodamines, methyl violets, phthalocyanine blues and greens, and nickel azo yellows. In all, DuPont manufactured more than 28 different types of organic pigments (Stipulation dated January 4, 1982, Exhibit 1, at 7)[7] and is the recognized leader in the production of quinacridones, hansa yellow, alpha phthalocyanines, and beta phthalocyanines. (CX 3010JJJ; 3418W; Whittemore 1943–44). DuPont's organic pigments are sold in both dry form and in aqueous dispersions. (CX 3010JJJ; 3418W; 3801L).

526. DuPont, which has one of the industry's largest sales forces and a nationwide network of warehouses (CX 3004M; 3106P), is one of the leading organic pigments suppliers to the trade sales paint and coating (including automotive) and plastics end-use segments of the market. (CX 1958T; 3106P; 3302B; Panush 2252).

527. DuPont is integrated backwards, particularly with respect to [***] (CX 704D; 2047K; 3004M; 3010JJJ; 3227A–B; 3302B). In addition, DuPont's Paints Division, which manufactures industrial and architectural (trade sales) coatings, represents a large captive outlet for the organic pigments produced by DuPont's Colored Pigments Division. (CX 3004M; 3302B; 3418W; Schober 1660–61).

528. Competitors in the organic pigments market generally considered DuPont to have strong technical service and research and development capabilities. (CX 272M; 704C–E; 2047L; 3004M; 3010JJJ; 3106P–Q). Since 1974, [***] (CX 3227A). DuPont's reputation throughout the organic pigments industry is outstanding, and its organic pigments are universally considered to be of high quality. (CX 272M; 1958T; 2047K; 3106P–Q).

(3) *American Hoechst Corp.*

529. American Hoechst Corp. ("American Hoechst") is a wholly-owned subsidiary of Hoechst AG, a West German company. (Geiss 2053). Hoechst produces petrochemicals, basic organic and inorganic chemicals, fibers, pharmaceuticals, agrichemicals, and veterinary products, resins and plastics, dyes and pigments, paints, reprography, and cosmetics. (CX 3517D). In 1978, Hoechst AG had worldwide sales of approximately $12 billion. (Stipulation dated February 10, 1982). CIBA-GEIGY estimated 1976 Hoechst AG worldwide [138] sales of dyes and pigments to be about $556 million, of which about

[7] The Color Index Names listed in the Stipulation can be identified according to chemical type by reference to F. 46, *supra*.

$110 million to be sales of pigments. (CX 3517E (converted to dollars based upon the 1976 exchange rate of 39.737 cents per DM)). Hoechst AG has organic pigments manufacturing facilities in West Germany, the United States, Mexico, Brazil, Australia and India. (CX 3517F–G).

530. Hoechst AG markets its organic pigments in the United States through the Pigments Department of American Hoechst Corp., which also manufacture organic pigments in the United States at Coventry, Rhode Island. (CX 3517F; Geiss 2055–56). In 1977, American Hoechst was the fourth-ranking competitor in the United States organic pigment market, with sales in excess of [***] million and a [***] market share.

531. American Hoechst began its organic pigments business in the United States in 1954, through the acquisition of Metro Dyestuffs, a company which manufactured dyestuffs, and Carbic Color, a distributor of textile dyes and chemicals. (Geiss 2063–64; Counihan 5533–35, 5674–76). In 1957, American Hoechst began producing organic pigments on a limited basis at its dyestuffs facilities in its Rhode Island Works ("RIW") in Coventry. (Geiss 2064–65). Over the ensuing years, Hoechst AG transferred some of its chemists and technical personnel to American Hoechst in the United States. (Geiss 2065). In 1970 and 1975, American Hoechst built new organic pigments (primarily azo) production facilities at the Rhode Island Works. (CX 715YYY; Geiss 2089).

532. Heinz Geiss, Vice-President of American Hoechst's Industrial Chemicals Division, estimates that American Hoechst's share of the United States organic pigment market has more than doubled since 1970, and considers this growth to have been the result of Hoechst AG's product line and research support, combined with American Hoechst's domestic production facilities, research and development effort, technical service, and sales organization. (Geiss 2067).

533. American Hoechst markets a broad line of organic products in the United States, including: hansa yellows, diarylide yellows, azo reds and oranges, quinacridones, perylenes, carbazole dioxazines, vat pigments, benzimidazolones, lithol rubines, and pyrazolones. (Geiss 2056; Stipulation dated January 4, 1982, Exhibit 1, at 1–2). American Hoechst imports about 50% of the organic pigments it sells in the United States on a dollar value basis. (Geiss 2058–59). It domestically manufactures about 75% of its organic pigments (on a poundage basis), including diarylide and hansa yellows, naphthol (azo) reds, dinitraniline orange, and carbazole dioxazine violets. (Geiss 2056–59). American Hoechst markets more than [***] different types of

organic pigments in the United States (Stipulation dated January 4, 1982, Exhibit 1, at 1–2), including [***] (which it purchases from BASF in West Germany). (Geiss 2093–94, 2125; Aschner 5367–68). American Hoechst sells organic pigments in all forms except in flushed colors. (CX 272M; 3418Y; 3801K). **[139]**

534. American Hoechst, known as the "house of yellows" because of its Yellow HR and Yellow FGL pigments (CX 212Y; Geiss 2077), sells its products, both imports and domestic production, on a nationwide basis and is strongly represented in all end-use segments of the industry, including automotive coatings. (CX 1958T; 3106H–I; Schober 1661; Panush 2252).

535. Hoechst AG and American Hoechst are both vertically integrated, manufacturing about [***] of their organic pigments intermediates requirements. (CX 3034; 3036; 3223X–Y).

536. Hoechst AG and American Hoechst are committed to organic pigments research and development. (CX 704E–F; 3302B; 3517J–K). In 1978, American Hoechst spent about [***] on organic pigments research and development in the United States and Hoechst AG, about [***] million in West Germany. (CX 3033; 3035B). The basic synthesis and new development of products is done at Hoechst AG while product modification or development for the United States market is performed at American Hoechst. (Geiss 2067–69). Two patented products which aided American Hoechst's growth in the United States—Yellow HR and FGL — were developed by Hoechst AG in Germany. (Geiss 2077).

537. American Hoechst is regarded as an innovator and is generally recognized as having excellent research and development and high quality products. (CX 272M; 769OOO; 1958T; 2047L; 3106H; 3801K; Schober 1674–76). It is planning further expansion of its organic production capability in the United States. (Geiss 2090–91).

(4) *CIBA-GEIGY Corporation (CIBA-GEIGY/U.S.)*

538. CIBA-GEIGY Corp. is the United States subsidiary of CIBA-GEIGY Limited, a Switzerland-based company which had worldwide sales of about $5 billion in 1978. (Papillo 1768; Stipulation dated February 10, 1982). CIBA-GEIGY Limited, which is one of the world's largest manufacturers of pigments, had worldwide organic pigments sales of about $160 million in 1976 (based upon an exchange rate of 40.013 cents per Swiss Franc). (CX 3508I). In 1977, CIBA-GEIGY Corp. was the sixth ranking firm in the United States organic pigments market, with sales of about [***] million and a [***] market share. (CX 1).

539. CIBA-GEIGY Limited markets over 600 organic pigment products in Europe, of which about 100–200 are sold in the United

States. (Papillo 1768–69). CIBA-GEIGY Corp. imports organic pigments, such as diarylide yellows, phthalocyanine blues and greens, [140]lithol rubines, disazo condensation yellows, oranges and reds, azo methine yellows, and isoindolinones. (Stipulation dated January 4, 1982, Exhibit 1, at 6; CX 4018). As of 1977, CIBA-GEIGY Corp. imported most of the products it sold in the United States. (CX 3106O; Papillo 1768). Because CIBA-GEIGY's product line in the United States is heavily oriented towards the high-performance end, its sales were primarily for use in plastics (especially fibers) and industrial coatings (including automotive coatings). (CX 212Z; 3010FFF; 3106O; 3504D; Panush 2252; Schober 1645, 1661).

540. CIBA-GEIGY Limited, like the other major European organic pigments manufacturers, is heavily committed to research and development. (CX 3215M; 3515; Papillo 1783–84). In 1977, its total organic pigments research and development expenditures were $10.6 million (between 5–8.4% of sales). (CX 3515A).

541. CIBA-GEIGY Limited has been known for its high level of product quality and technical capability, particularly with respect to the development of [***] (CX 272M; 769NNN; 3010FFF; 3106O; 3418; 3801L).

542. In 1979, CIBA-GEIGY Corp. acquired the pigment business of Hercules, Inc. (CX 3215M; 3302B). Hercules, which manufactured organic and inorganic pigments (CX 3010GGG; 3215M; 3418Y), was the fifth ranking firm in the organic pigment market in 1978, with sales of about [***] and a market share of [***] (CX 2). Hercules had a fairly broad product line. (Stipulation dated January 4, 1982, Exhibit 1, at 9–10). Its organic pigments were sold in dry form, aqueous dispersions, and non-aqueous dispersions (CX 3010GGG; 3801J) to most end-use segments of the industry, with a heavy emphasis on plastics. (CX 3010PPP). Hercules had a reputation for producing quality pigments (CX 272M) and was one of the few manufacturers to successfully market easily dispersible pigments. (CX 3106T; 3418Y; Schober 1675). By acquiring Hercules, CIBA-GEIGY Corp. obtained a domestic manufacturing facility for organic pigments and a large, well-established customer base. (CX 3010GGG; 3215M; 3302B).

(5) *American Cyanamid Co.*

543. American Cyanamid Co., which produces organic pigments, inorganic pigments, and dyestuffs (CX 1958T; 3010ZZZ), was the fifth-ranking manufacturer of organic pigments in 1977, with sales in excess of [***] and a market share of [***] (CX 1). American Cyanamid was also the fourth-ranking producer of phthalocyanine pigments. (CX 3).

544. In 1977, American Cyanamid's product line consisted of

phthalocyanine blues and greens, carbazole dioxazine, methyl violets, PMA greens and blues, napthol reds, toluidine reds, Red 2B, lithol [141]reds, BON reds, and lithol rubines. (Stipulation dated January 4, 1982, Exhibit 1, at 1; CX 3010ZZZ, 3215O). Competitors considered American Cyanamid to be an industry leader (CX 2047K), particularly in the production of azo red pigments and phthalocyanines used in printing inks. (CX 212Z; 2047L; 3010III, ZZZ; 3106F; 3215O; 3302C; 3418X). American Cyanamid considered itself to be a price leader with respect to certain azo red pigments (CX 3415B; McKenzie 6943–44) and expanded its azo and phthalocyanine production facilities in the 1970s in order to increase its market position in these products. (CX 708N; 2047L; 3106F; 3415A–C). American Cyanamid produces the basic intermediates it uses to manufacture azo red and phthalocyanine pigments (CX 3010III, ZZZ; 3023C; 3223Y; 3302C; 3413; 3415C) and expanded its production capacity of intermediates used to manufacture azo red pigments in 1976. (CX 3215O).

545. American Cyanamid's R&D expenditures averaged approximately [***] annually between 1974 and 1979. (CX 3223E; 3414). American Cyanamid developed a reputation for quality products and good technical service support. (CX 212Z; 272M; 3302C).

546. In October 1980, American Cyanamid withdrew from the phthalocyanine business and sold its related technology and business to Sun Chemical. (CX 3023; 3118).

(6) *Harmon Colors Corp.*

547. Harmon Colors was a subsidiary of Rhinechem Corp., which is a subsidiary of Bayer AG of West Germany. Effective January 1, 1981, Harmon Colors became the Pigments Department of the Dyes and Pigments Division of Mobay Chemical Corp., which is also a subsidiary of Rhinechem. (Schober 1637–38; 1675).

548. Bayer AG, one of the world's largest chemical companies (CX 2047E; 3215N), had worldwide sales (of all products) in excess of $11.3 billion in 1978. (Stipulation dated February 10, 1982). In the United States, Bayer markets dyestuffs through its Verona subsidiary (CX 3215N–O) and organic pigments through Harmon Color which it acquired from Allied Chemical in 1977. (CX 912A; 3986C). In 1977, Harmon Color was the seventh-ranking firm in the United States organic pigments market, with sales in excess of [***] and a market share of [***] (CX 1).

549. Harmon Color's product line consists of organic pigments (with the exception of two inorganic pigment preparations). (Schober 1645). Harmon Color manufactured organic pigments such as hansa yellows and oranges, diarylide yellow and oranges, pyrazolone reds,

phthalocyanine blues and greens, Red 2B, perylenes, quinacridones, carbazole dioxazine, and thioindigo reds. (Stipulation dated January 4, 1982, Exhibit 1, at 14; CX 910C; 3301B; [142]3304B; 3418Z). Most of Harmon Color's sales are to the coatings industry, primarily for automotive coatings. (CX 3305F). Harmon Color is considered to be one of the leading manufacturers of high-performance organic pigments used in automotive coatings and paints. (CX 212Z; 908B; Panush 2252, 2300; Schober 1645, 1660–61). It manufactures more than 50% of the intermediates it uses to produce organic pigments. (CX 3303).

550. Harmon Color's research and development group is maintained separately from its technical service group and sales force. (Schober 1648). The research and development group is responsible for the development of new products, product modifications, and process improvements and maintains contact with end-users in order to formulate new ideas and to assist in the sales and service associated with the introduction of Harmon Color's pigments. (Schober 1648). Harmon Color expended about [***] on research and development in 1978. (CX 3309). Harmon Color's technical services group is responsible for evaluating competitive products, and product testing, and maintains contact with customers in order to explain application technology to the end-users. (Schober 1647–48).

551. Harmon's nationwide sales force consists of well trained, technically-oriented personnel. (Schober 1646–47). They are regularly provided with the results of technical testing and evaluation of competitive products. (Schober 1658–59). Harmon Color is recognized as an innovator and producer of high quality products. (CX 908C; 910B–C; 3106R; 3801J). It is one of the few companies that has successfully developed chrome replacement organic pigments. (Schober 1674–75).

(7) *Hilton-Davis Division Of Sterling Drug Inc.*

552. Hilton-Davis, a division of Sterling Drug Inc. (CX 922D; 929D), manufactures organic pigments, inorganic pigments, and dyestuffs. (CX 920A; 921D; 3010HHH; 3106U). In 1977, it was the ninth-ranking manufacturer of organic pigments, with sales in excess of [***] million and a market share of [***] (CX 1). It ranked seventh in phthalocyanines. (CX 3).

553. In 1977, Hilton-Davis manufactured hansa yellows, diarylide yellows and oranges, dinatraniline and pyrazolone oranges, Para reds, toluidine reds, lithol reds, lithol rubine, Red lake C, methyl violets and PMA blues, and phthalocyanine blues and greens. (Stipulation dated January 4, 1982, Exhibit 1, at 16–17). Hilton-Davis sells organic pigments on a national basis as dry powder, flushed,

and in aqueous dispersions. (CX 1958T; 2047K–L; 3010HHH; 3801J). Its products are purchased by all end-use industries. (CX 921C–D; 2047L; 3106U). Hilton-Davis is considered to be strong in flushed colors. (CX 212Z; 1958T; 2047L; 3418Y). **[143]**

554. Hilton-Davis spent an average of some [***] on research and development related to organic pigments between 1974 and 1979. (CX 3863). Hilton-Davis produces about [***] of the intermediates that it uses in the manufacture of its organic pigments. (CX 1958T; 3106U; 3864).

555. Late in 1978, [***] BWC entered into the CPD acquisition agreement with Allegheny Ludlum Industries in November 1978. F. 499–500, *supra.*

(8) *Magruder Color Company, Inc.*

556. Magruder Color Company (Magruder) is privately-owned and is one of the fastest growing organic pigment manufacturers in the United States. (Weissglass 2520; Counihan 5555–56; 5782–83). In 1977, Magruder was the eleventh-ranking firm in the organic pigment market, with sales of about [***] and a [***] market share. (CX 1).

557. Magruder's product line consisted of conventional organic pigments, including rhodamines, Red 2B, BON Red, lithol rubines, and methyl violet. (Stipulation dated January 4, 1982, Exhibit 1, at 12; Weissglass 2486). In 1978, Magruder began producing phthalocyanine blue pigments. (Weissglass 2486). By the acquisition of Indol in 1980, Magruder added diarylide yellows to its product line. (Weissglass 2490–91). Although Magruder sells some of its organic pigments in dry form, it is primarily a manufacturer of flushed colors sold to the printing ink industry. (Weissglass 2487; 2542; Malchick 3075–77; CX 3418AA). The Indol acquisition gave Magruder an opportunity to extend its pigments sales to the textile industries and plastics. (Weissglass 2488; 2495–98).

558. Magruder does not manufacture any of the intermediates it uses to produce organic pigments. (CX 3822C; Weissglass 2523). It purchases many of its organic pigments from others in dry form, flushes them and sells them to the printing ink industry. (Weissglass 2489; Counihan 5757–58; CX 3822C–E).

559. Magruder engages in some research and development, but it does not have the technological capability to manufacture high-performance pigments which require sophisticated chemical know-how. (Weissglass 2502–03). Magruder focuses its development work on improving its own products or matching the products offered by its competitors. (Weissglass 2503–05; 2499–2500). **[144]**

(9) *Apollo Colors, Inc.*

560. Apollo Colors, Inc. (Apollo) is a small organic pigments manufacturer with less than [***] of the organic pigments market. (CX 1; 3010TTT). Apollo manufactures diarylide yellows, BON Red, lithol rubine, and phthalocyanine blue pigments. (Stipulation dated January 4, 1982, Exhibit 1, at 3). Its pigment sales are all in flushed form. (CX 3010TTT; Counihan 5757–58). Apollo is a regional competitor in the Midwest (CX 3106J; 3418) and has established a small position in the flushed colors segment of the organic pigment market.

561. Apollo purchases all of the intermediates it uses to manufacture organic pigments. (CX 3010TTT; 3901B). Apollo engages in some research and development and has spent an average of [***] per year on research and development since 1974. (CX 3901B).

(10) *Pope Chemical Co.*

562. Pope Chemical Co. (Pope) manufactures phthalocyanine blue and green, and diarylide yellow organic pigments in flushed form. (Stipulation dated January 4, 1982, Exhibit 1, at 13; Giniger 7228–29; 7206). Pope also manufactures some pigment dispersions using organic pigments which it purchases from competitors. (Giniger 7206). Its products are sold to the printing ink industry. (Giniger 7227–28; 7229). It considers its primary competitors to be Apollo and Magruder. (Giniger 7229).

563. In 1977, Pope's organic pigment sales were less than [***] and its market share was below [***] (CX 1; 3106BB). Pope's sales have increased since 1977 (Counihan 5560; Malchick 3354–56), and on a dry toner basis, its 1981 sales would be valued at about [***] (Giniger 7224).

564. [***] (Giniger 7228; CX 3106BB; 3418AA). Pope Chemical's research and development function consists primarily of matching competitive products and fulfilling the specific needs of its customers. (Giniger 7208–09).

(11) *Harshaw Chemical Co.*

565. Harshaw Chemical Co. (Harshaw) manufactures organic and inorganic pigments. (CX 3010AAAA). In 1977, Harshaw's organic **[145]**pigments sales were less than [***], making it the twelfth-ranking firm in the organic pigment market, with a share of [***] (CX 1).

566. In 1977, Harshaw's organic pigments product line consisted of conventional organic pigments, including hansa yellows, diarylide yellows and oranges, azo reds, and phthalocyanine blue. (Stipulation dated January 4, 1982, Exhibit 1, at 8–9; CX 3010AAAA). Its organic

pigments products were sold primarily to the trade sales paints and industrial coatings end-use segments of the industry. (CX 3010AAAA; 3302C; 3418Z).

567. Harshaw purchases all of the intermediates that it uses in the manufacture of organic pigment products. (CX 3845). Harshaw's annual research and development expenditures averaged at about [***] between 1974 and 1979. (CX 3842).

568. [***] Subsequent to the preparation of the study (CX 3846), James Canon, then General Manager of Harshaw's organic pigments business, recommended against it. (Canon 12519–22; 12534–35).

569. Other small organic manufacturers with market shares around 2% or less, such as Borden and Ridgway, produced limited amounts of organic pigments (diarylide yellows, azo reds, and phthalocyanine blue) primarily for captive consumption by affiliated printing inks producers. *See* CX 3010UUU; 3106L, CC; 3418Z; 3931. Ridgway is a division of Sinclair & Valentine, a printing inks producer which consumes about 70% of Ridgway's organic pigment production. (CX 3106CC; 3418Z; 3931). Borden's organic pigments are captively consumed by its Levey Division. (CX 3106L; 3418Z).

570. As of 1978, except for Hoechst AG, Bayer AG, and CIBA-GEIGY, no foreign manufacturer of organic pigments has significantly penetrated the United States organic pigment market. *See* CX 1–2. ICI, Sandoz, and the Japanese producers (Toyo, Dainippon, and Dainichiseika) sold a small amount of organic pigments in the United States, but none of these companies has achieved a significant market share.

(12) *ICI Limited*

571. ICI manufactures and sells a wide range of organic pigments, including phthalocyanine blues and greens, diarylide yellows, toluidine reds, flavanthrone yellow, indanthrone blue, and disazo condensations, on a worldwide basis. (Parker 4943–44; CX 769PPP). Considered to be one of the top worldwide producers of organic pigments, ICI is integrated backwards and maintains extensive, **[146]**marketing and technical support staff in many countries. (Parker 4942–45). ICI spends about $3–4 million a year on pigment-related research. (Parker 4940).

572. In the United States, ICI markets phthalocyanine greens, indanthrone blues, and flavanthrone yellows (all of which are imported) through ICI Americas. (Parker 4946; 4962–63; Stipulation dated January 4, 1982, Exhibit 1, at 10). On a dry toner basis, ICI's organic pigment imports into the United States during the period 1977–79 averaged [***] (Parker 4977–78). ICI maintained a staff of about 8 marketing and technical support personnel in the United

States during that period. (Parker 4979). ICI was not considered as a significant competitor in the United States market. (Whittemore 1990–91).

573. As of 1980, ICI had no plans to increase its organic pigments staff in the United States. (Parker 4981–82). ICI has never considered acquiring a United States manufacturer of organic pigments. (Parker 4985). It has never seriously considered *de novo* expansion in the United States organic pigments market. (Parker 4955–56; 4986). In Mr. Parker's view, the profitability of the organic pigment business in the United States is low and would not justify financial and marketing resources that would be required for any ICI expansion. (Parker 4957–62).

(13) *Sandoz*

574. Sandoz AG (Sandoz) is a Swiss manufacturer of organic pigments (CX 769SSS), and had insignificant sales of organic pigments in the United States. (CX 1). Sandoz estimated its U.S. market share to be [***] (CX 3801K). Although Sandoz manufactured a small amount of azo red and yellow pigments in the United States in 1977 (Stipulation dated January 4, 1982, Exhibit 1, at 15–16; CX 3801K), it subsequently closed its New Jersey manufacturing facility. (Counihan 5676–77).

575. Sandoz was among the serious bidders for CPD in May-June 1978 and again in late 1978. F. 301, *supra.*

576. The three largest Japanese manufacturers of organic pigments are Toyo, Dainippon, and Dainichiseika. (Whittemore 1943). In 1967, the Japanese manufacturers began importing phthalocyanine crude into the United States and became the primary source for many phthalocyanine producers in the United States, primarily because domestic supply of crude was limited and the Japanese crude prices were low. (Counihan 5539; Counihan dep. CX 5087ZZ). Dainippon was among serious bidders for CPD in May-June and again in late 1978. F. 301, *supra.* **[147]**

577. The Japanese producers have made attempts to sell finished organic pigments in the United States, with very little success. (Papillo 1890–91; Whittemore 2003–06; Counihan dep. CX 5087AAA–BBB).

578. In 1977 and 1978, [***] negotiated separately, but did not enter into any agreement, with Toyo and Dainichiseika concerning a joint phthalocyanine crude venture in the United States. [***]

VI. THE CHALLENGED ACQUISTION CONSTITUTES A PRESUMPTIVE VIOLATION OF SECTION 7 ON THE BASIS OF MARKET STRUCTURE EVIDENCE

A. *The Rule Of Presumptive Illegality Governing Horizontal Mergers Should Be Applied In This Case*

579. It has been settled, on the basis of case law and established enforcement policy, that a horizontal merger producing a firm with an aggregate market share of 10–12% in an unconcentrated market is a presumptive violation of the amended Section 7 of the Clayton Act and is prohibited, unless it is shown that the market shares are not reliable indicia of the true competitive significance of the merging firms or that the market is likely to perform competitively regardless of the merger. *See* IV Areeda and Turner, *Antitrust Law* (hereafter *"Antitrust Law"*), ¶¶ 909–912 at 29–68 (1980); Sullivan, *Antitrust,* Section 204 a and b at 613–21 (1977); Department of Justice Merger Guidelines, Sections 5–6, 1 Trade Reg. Rep. ¶ 4510 (1980).

580. There is some support for a rule which would permit, in a competitively structured market, the acquisition of firms with 1 or 2% of the relevant market by firms with market shares of no more than 12–15%, unless it is shown that the market shares of the merging firms considerably understate their competitive significance. *See* IV *Antitrust Law,*¶¶ 911a, 911f at 60–61, 65–68.

581. There is some authority which holds that a market consisting of 30 firms with market shares ranging from 1 to 15% may be characterized as a competitively structured market for the purpose of raising the aggregate market share threshold level for presumptive illegality from 10% to 15–17%. *See* IV *Antitrust Law,*¶ 911f at 65–67.

582. There is some support for invoking the *prima facie* rule at a lower threshold level in concentrated industries. One commentator has proposed that any horizontal merger in an industry with 8-firm [148]concentration ratio, of 50% or more and 20-firm ratio of 75% or more (Kaysen and Turner's "Type I oligopoly"), or an industry in which eight (or less) of the 20 (or less) firms control a third of the market, be prohibited unless the merger proponents can "demonstrate the factors which diminish the significance of concentration data." Sullivan, *Antitrust,* at 619–21 (1977).

583. "Concentration ratio" is the aggregate percentage share of the market universe accounted for by a specified number of the largest firms in the market. The most commonly used concentration ratios are the 4-, 8- and 20-firm ratios.

B. *The Organic Pigment Market Is Concentrated*

584. In 1977, total industry sales of organic pigments (based upon the dry toner value of sales, captive consumption, imports and exports) were approximately $366,714,049. (CX 1). CPD's sales were approximately [***], making it the third-ranking firm in the organic pigment market with a market share of [***] BWC ranked thirteenth, with sales of approximately [***], or a market share of [***] (CX 1). About 32 firms reported organic pigment sales for 1977 in the FTC Industry Survey.

585. In 1978, total industry sales of organic pigments were $416,951,537. CPD's sales increased to about [***] for a market share of [***], which made CPD the fourth-ranking firm in the market. BWC's sales in 1978 were about [***] for a market share of [***] and it ranked sixteenth in 1978. (CX 2). About 34 firms reported organic pigment sales for 1978 in the FTC Industry Survey.

586. In 1979, total industry sales of organic pigments were about $462,766,164. The combined sales of BWC/CPD were about [***], which made BWC after the acquisition the third-ranking firm with 10.5% share of the market. (RX 2103 (revised 8/28/81)). About 43 firms reported organic pigment sales for 1979 in the FTC Industry Survey.

587. The following table shows the market shares of BWC and CPD, before and after the acquisition, in the organic pigment market:

Year	Universe	BWC	CPD	Combined
1977	$366,969,508	[***]	[***]	11.57%
1978	417,057,858	[***]	[***]	10.63%

Source: CX 1–2. **[149]**Thus, the 1978 merger produced a firm with an aggregate share of 10.63% in the organic pigment market.

588. The following table shows the market shares of BWC and CPD, before and after the acquisition, in the alleged phthalocyanine submarket:

Year	Universe	BWC	CPD	Combined
1977	$ 83,319,843	[***]	[***]	16.78%
1978	86,874,408	[***]	[***]	14.52%

Source: CX 3–4. Thus, the merger would have produced a firm with an aggregate share of 14.52% in the alleged submarket. The number of firms reporting phthalocyanine pigment sales in the FTC Industry Survey was about 30 for 1977 and 34 for 1978.

589. The organic pigment market in the United States is

concentrated. The 4- and 8-firm concentration ratios were 49.2% and 71.4%, respectively, for 1977, 47.3% and 71.2%, respectively, for 1978, and 49.6% and 76.0%, respectively for 1979. The 20-firm concentration ratios exceeded 90% for each of the years. (CX 1–2; RX 2103). Thus, the organic pigment market falls within "Type I oligopoly," or between "loose oligopoly" and "tight oligopoly," on the basis of the number and size distribution of sellers in the Kaysen and Turner industry classification. *See* Kaysen and Turner, *Antitrust Policy,* at 30, 72 (1965).

590. For 1977 and 1978, the 4-, 8- and 20-firm concentration ratios of the organic pigment market were somewhat higher than the corresponding average concentration ratios for all manufacturing industries in the United States. *See* Kamerschen 10,877–82.

591. Mr. Glassman and Dr. Adelman, respondent's expert witnesses, testified that the sales-weighted concentration ratios for 5-digit industries were more meaningful than the unweighted ratios for 4-digit industries. (Glassman 8694–98; Adelman 10,251). For 1977, the 4-firm concentration ratio in the "Synthetic organic pigment lakes and toners," SIC Code 28653 (the 5-digit industry corresponding most closely to organic pigments) was about 48%, higher than the weighted average concentration ratio for all 5-digit industries, which was about 46%.

592. The Herfindahl Index, another measure of market concentration, is the sum of the squares of the market shares of each **[150]** and every firm in the market. While concentration ratios do not disclose any information regarding the firm-size distribution in terms of market shares, the Herfindahl Index increases with a reduction in the number of firms or increasing firm-size disparity in terms of market shares among a given number of firms. *See* IV *Antitrust Law,*¶913a2 and 913c2, at 76, 79–80.

593. Substantial authority regards Herfindahl Index as superior to concentration ratios. Herfindahl Index is readily adaptable as of general presumptive test of mergers based on the relative size of the merging firms. *See* IV *Antitrust Law,*¶¶913a2 and 913c2. *Also see* Adelman 12,244, 12,336.

594. There is authority which suggests that for a presumptive test of horizontal mergers a Herfindahl Index of 0.13 (or more) is a reasonable threshold in a highly concentrated market. *See* IV *Antitrust Law,*¶¶913, 913c2 at 74, 79–80.

595. On the basis of RX 9072 (revised) prepared by Dr. Adelman to show the Herfindahl Index for the organic pigment market for the years 1977, 1978 and 1979, Dr. Adelman, on surrebuttal, expressed an opinion that the organic pigment market is competitively

structured. (Adelman 12,340). According to RX 9072 (revised), the estimated Herfindahl Indices for 1977, 1978 and 1979 are 0.081, 0.078 and 0.085, respectively. For the purpose of these estimates, Dr. Adelman assumed that all the firms in "All others" category had equal shares for each of the three years. (Tr. 11,781). However, the small fringe-firms that are difficult to identify would not affect the index significantly. And the effect of a given merger on the Herfindahl Index would be the same regardless of the number and size distribution of the other firms in the market. *See* IV *Antitrust Law,*¶913a2 at 76.

596. In 1977, CPD was the third largest firm in the alleged phthalocyanine pigments submarket with sales of about [***] and a market share of [***]; BWC ranked sixth in the market with sales of about [***] and a share of [***]. The value of all domestic production and imports of phthalocyanine pigments was about $82,955,316. (CX 3). In 1978, CPD retained its third rank, with sales of about [***] and a market share of [***]; BWC ranked seventh with sales of about [***] and a share of [***]. In 1978, the value of domestic production and import of phthalocyanines was about $86,793,000. (CX 4). In 1979, that figure substantially increased to about $120,096,000. BWC/CPD became the third-ranking firm, with about 12.4% of the submarket. For the three years, Sun Chemical and DuPont occupied the top two ranks, accounting for 43 to 46% of the submarket. (RX 2104 (revised)).

597. The alleged phthalocyanine pigment submarket is more concentrated than the organic pigment market. The two-, four-, and [151]eight-firm concentration ratios in the alleged submarket for the years 1977, 1978 and 1979 were as follows:

	1977	1978	1979
Two-firm	45.8%	44.1%	43.4%
Four-firm	66.5	63.0	63.7
Eight-firm	86.9	82.2	84.2

Source: CX 3–4; RX 2104A (revised).

598. During the years 1977 to 1979, there was relatively more stability than instability in the ranking among the leading firms in the organic pigment market. *See* CX 1–2; RX 2103a. The top four firms in 1977 (Sun Chemical, DuPont, CPD and American Hoechst) were also the top four in 1978, although CPD and American Hoechst changed positions because of a [***] difference in market share. There was no change in the top two throughout the relevant years. And, the top nine firms in 1977 were also the top nine in 1978, although there were some changes in ranking among the nine. For

1979, due to the BWC/CPD and CIBA-GEIGY/Hercules mergers, there was a new alignment in the top four, as well as considerable shifting in ranking among the remaining firms. *See* RX 2103a.

599. Based on RX 2103 (revised), Mr. Glassman, respondent's expert witness, expressed an opinion that there was "frequent and sometimes extreme changes in the market share rank" in the organic pigment market and that this showed "the existence of competition and the existence of rivalry." (Tr. 8702). Mr. Glassman pointed out that Hercules went from the eighth in 1977 to fifth in 1978 and that Apollo went from sixteenth in 1977 to eleventh in 1979. (Tr. 8703–04). He also expressed an opinion that the existence of such small but growing firms as Magruder, Apollo, Pope, Allegheny, Galaxie and others was likely to exert some destabilizing influence in the market. (Glassman 8714–16).

C. *The Evidence Fails To Show a Discernible Trend Towards Greater Concentration In The Organic Pigment Market*

600. There is substantial authority which holds that even small horizontal mergers should be prohibited if a trend toward greater concentration exists in a partially concentrated market. The rationale is that if a particular merger can clearly be seen as a part of a larger dynamic threating excessive concentration in the market, it should not be permitted. *See* IV *Antitrust Law,* ¶914 at 81–83; Sullivan, *Antitrust* Section 204c at 621–22. **[152]**

601. Section 7 case law and established enforcement policy suggest a rule that if in any period of from five to ten years, the leading firms (from 2 to 8) in a partially concentrated industry have increased their market shares by 7% or more, any merger which increases the share of any significant firm by 2% or more should be prohibited. A more restrictive rule, proposed by Bok in 1960 and based on the aggregate market shares of the largest firms without regard to the degree of concentration or the number of sellers in the market, has not been followed. *See* IV *Antitrust Law,*¶914 at 81–83; Department of Justice Merger Guidelines, Section 7, 1 Trade Reg. Rep. ¶4510 (1980).

602. The market share evidence in the record does not embrace a period sufficiently long to invoke the rule of presumptive illegality based on any "trend" toward greater concentration. The FTC industry survey covered only a 2-year period from 1976 to 1978. In any event, during that period, BWC's market share remained under 2% and BWC could not have been characterized as a "significant firm."

603. During the late 1970s, the organic pigment industry witnessed a number of acquisitions and partial withdrawals by industry

members. In 1972, Sherwin-Williams Co. discontinued production of phthalocyanines and lithol rubines and sold related formulae and customer lists to Sun Chemical Co. Sherwin-Williams continues to produce alkali blues. (Counihan 5542; CX 953C, G; 702U; 3202N). By 1974, GAF Corporation discontinued production of phthalocyanine pigments. (CX 3202N; 165A; 593C; 702M; Counihan 5542–43).

604. In 1977, Bayer AG acquired Harmon Colors Corp. from Allied Chemical Co. (CX 912A; 3986C). In 1978, BWC purchased from GAF Corporation the production facilities located at Rensselaer, New York and related technology. (RA 133). These facilities had been used by GAF to manufacture a small amount of organic pigment products. (RA 136). In 1979, CIBA-GEIGY acquired the pigment business of Hercules Corporation. (CX 3001C, 240C; Counihan 5553). In February 1980, Magruder acquired the Indol Chemical Division which produces organic pigments from M. Lowenstein & Co. (Weissglass 2482; Counihan 5555; CX 3107X). In 1980, American Cyanamid withdrew from the phthalocyanine business [***] (RX 6153, 6155, CX 3118; Whittemore 1916; 1922–23). [***] (Whittemore 1960–61).

605. On the other hand, the evidence shows a rapid and substantial growth of a number of small firms during the recent past, outpacing the overall industry growth rate. This evidence is **[153]**inconsistent with a trend toward greater concentration in the organic pigment market. F. 556–69, *supra.*

D. *The Evidence Does Not Show An Undue Reduction In The Number Of Sellers In The Organic Pigment Market*

606. The argument for a rule of presumtive illegality of a given sized merger is stronger when there has been an undue reduction in the number of firms in a market. There is some authority which holds that the critical number is between 10 to 12. *See* IV *Antitrust Law,* ¶911a and b at 60–62.

607. The evidence does not show an undue reduction in the number of sellers in the organic pigment market. The FTC industry survey in this case involved some 100 firms, and more than 30 firms reported organic pigment sales data to the FTC for the years 1977–79. (Glassman 8707–08). *See* F. 584–86, *supra.*

VII. CERTAIN FACTORS OTHER THAN MARKET SHARES WHICH BEAR ON THE EFFECTS OF THE ACQUISITION

A. *The Direct Competition Between The Merging Firms Eliminated By The Challenged Acquisition Is De Minimis*

608. BWC and CPD were competitors in the sale of organic

pigments in the United States prior to the acquisition challenged herein. (CX 755P; 1907W–X; 3213D; 3214B; Muench 3825–26; Albers 6223–24). BWC identified CPD as a competitor in the sale of the following organic pigments: Pigment Violet 23 (carbazole violet), Pigment Red 123 (perylene), Pigment Green 10 (nickel azo), Pigment Red 5711 (lithol rubine), Pigment Yellow 14 and 17 (diarylide yellow), Pigment Blue 15 (phthalocyanine blue), Pigment Green 7 (phthalocyanine green) and Pigment Green 36 (phthalocyanine green). (CX 1710).

609. CPD included BWC as a competitor in its marketing plans. (CX 784R–S; 2036G; 2041H; 2047E, EE). BWC included CPD as a competitor in its marketing plans. (CX 202J; 212Y; 227I, Y). They were competitors in the sale of organic pigments to the printing ink, plastics, and paint industries. (CX 1833; 1836; 1838). A comparison between CPD's top 50 customers (RX 2722) and BWC's largest customers, ranked by end-use industry (CX 1708), reveals that [***]. **[154]**

610. Subsequent to the acquisition, CPD ceased production of several organic pigment products, including: perylenes (Malchick 3157), phthalocyanine crude (Malchick 3157; Kiesling 6149; *see* CX 663B–C), some phthalocyanine beta blue (P.B. 15:3) (Malchick 3159), and phthalocyanine alpha blues (P.B. 15:1, 15:2). (Malchick 3158). *See also* Long 5965–66.

611. Prior to the acquistion, BWC sold most of its organic pigments in dry form to the coatings industry, while CPD sold most of its organic pigments in flushed form to the ink manufacturing industry. *See* F. 308–10, 413, *supra.*

612. Eli M. Aschner, former marketing manager of the PIC Department of BWC, testified for respondent that BWC and CPD met "on an extremely limited basis, the exception rather than the rule." The reason is that "essentially we were existing in different worlds." (Tr. 5373). Mr. Aschner stated that he regularly reviewed salesmen's reports and that instances of mention of CPD in BWC's salesmen's reports were "really rare" because the product lines of BWC and CPD did not significantly overlap. (Tr. 5375–76). We were "really working in different businesses." (Tr. 5376). "Chemetron functioned in areas where we did not function." (Tr. 5377).

613. Richard L. Alsager, marketing research manager for the Pigments Division of BWC and formerly of CPD, testified for respondent that the vast majority of CPD's sales were in flushed colors to the paste ink industry, whereas BWC sold no flushed color and its specialty was sales to the coatings industry with a small amount of sales to the plastics industry. (Tr. 3608–10). RX 2722–2723

(revised 8/19/81) shows that, [***] (Tr. 3670). *See also* RX 4065D (Acquisition of CPD supplemented BWC's product line in the United States (May 23, 1978)); RX 6785G, II (Lists CPD's major competitors and BWC is not listed); CX 2041F (April 19, 1974); CX 2047K (CPD document in which BWC is not listed among CPD's major competitors (July 14, 1977)).

614. Dr. Erwin F. Hahn, former manager of BASF America, testified that in the area where BWC extended the greatest effort—auto coatings—BWC did not meet CPD, which emphasized sales to the printing ink industry, particularly of flushed pigments. BWC did not flush organic pigments and had a small penetration in the printing ink industry selling dry pigments (Tr. 4011, 4016). Dr. Josef F. Kohnle testified that BWC did not sell alkali blue and did not flush the two areas important to CPD, and that CPD did not produce specialty pigments imported by BWC. (Tr. 4418). **[155]**

615. Jerome E. Counihan, who, prior to his retirement in 1980, was the president of CPD and of the Pigments Division of BWC, stated that before the acquisition he never considered BWC a competitor of CPD. CPD sold largely flushed pigments for use in oil varnishes that go into sheet-fed web offset and letterpress fields, whereas BWC's organic pigments for ink were used in a publication gravure application. (Tr. 5633–36). He also stated that BWC produced no flushed pigments, whereas about 70% of CPD's organic pigment business was flushed. (Tr. 5634). CPD's primary end-use industry was the ink industry and less than 10% of CPD's phthalocyanines were sold in dry form. (Tr. 5635, 5637).

616. Paul Papillo, head of CIBA-GEIGY's United States pigment business, testifying in the case-in-chief, stated that he did not know of a situation where CPD, BWC and CIBA-GEIGY competed head to head in the marketplace. (Tr. 1872).

617. Heinz Geiss of American Hoechst, testifying in the case-in-chief, stated that in his ten years of pigment sales experience in the United States, he never saw BWC and CPD in direct competition for the same account. (Tr. 2161–62). Mr. Geiss also testified that American Hoechst rarely came into contact with CPD in the marketplace, and that [***] (Geiss 2161–62; Malchick 3346–47).

618. Sol Panush of Celanese, a customer of BWC, testifying in the case-in-chief, stated that from his point of view (automobile coating), BWC and CPD were not in competition prior to the acquisition. (Tr. 2327–28).

B. *BWC Was A Small and Insignificant Factor In The Organic Pigment Market*

619. Herbert McKenzie, former manager of the colored pigments

department of American Cyanamid, did not view BWC as an important competitor and did not base pricing decisions on his perceptions of BWC or BASF AG. (Tr. 6923).

620. American Hoechst felt that prior to the acquisition of CPD, BWC was weakly represented in the pigment field. (CX 3001E). Heinz Geiss testified that American Hoechst did not consider BWC to be a significant factor in the organic pigments industry in the United States. (Tr. 2157). He testified that BWC was competing only via **[156]**imports [***] (Tr. 2169, 10703, 10726). He also stated that [***] (Tr. 2159). An American Hoechst document of March 31, 1978, viewed BWC [***] (CX 3009L). *See also* CX 3010VV–YY [***].

621. Mr. Whittemore of Sun, testifying in the case-in-chief, stated that before the acquisition of CPD by BWC, Sun saw only sporadic activities on the part of BWC to sell products in the United States business on an import basis. Prior to 1974, BWC put on a "semi-major drive" to sell phthalocyanine in the United States but after shortages came, BWC withdrew and never came back in a serious way. (Whittemore 1947–48). Mr. Whittemore stated that he saw no major effort by BWC after 1973. (Tr. 1951). In addition, Sun has never taken any action or developed any pricing policy in the United States based on its perception of BASF AG in Europe. (Whittemore 1986). BWC was only a minor factor in the organic pigment business in the United States in 1977–1978. (Whittemore 1980).

622. Erhard E. Schober of Mobay (a subsidiary of Rhinechem) perceived BASF AG as attempting to establish itself in the United States organic pigments industry based on increased activities of BASF AG and BWC during the mid-to late 1970's. (Tr. 1663–64). However, Mr. Schober still perceived BASF AG as being in the lowest of three groups in the United States market prior to the CPD acquisition. (Tr. 1668). This statement is confirmed by a Rhinechem document, [***] (CX 3307C (1978)).

623. Mr. Papillo of CIBA-GEIBY viewed BWC as basically a supplier of specialty pigments, like CIBA-GEIGY. (Tr. 1826; CX 3508). He testified that CIBA-GEIGY's business was stagnating because of import problems and could not have expanded its import base profitably. (Tr. 1876–78).

624. Mr. Panush of Celanese Corporation testified that BWC [***] (Tr. 2316, 2327, 2370). He also testified that, before its acquisition of CPD, BWC ranked in [***] (Tr. 2307–08). According to Mr. Panush, BWC also [***] **[157]**[***] (Tr. 2325).

C. *BASF AG, Because Of Its Worldwide Position, Was Watched By The Leading Firms In the United States Organic Pigment Industry As A Possible Source of Competition Apart From BWC's Presently Insignificant Market Position*

625. There was a perception during the mid-1970's that BASF AG was attempting to exand its presence in the United States colorants market. (Papillo 1836–47; Schober 1662–64; 1668; Counihan 5766; Panush 2256–59; Kohnle dep. CX 5090BB; CX 2047E; 3409A; 3418Z).

626. BASF's acquisition of GAF's Rensselaer facility in March 1978 was viewed by some as the base for BASF's potential expansion in organic pigments as well as dyestuffs. (CX 3215F, J, N; 3508P; 3821L). Some perceived that BASF would probably build an organic pigments facility in the United States. (CX 3106K; 3223P; 3603I, AA; 3801L). In January 1979, Kohnle of BASF told some industry members that [***] (CX 3408; 3409A).

627. The leading competitors in the United States organic pigment market monitored BASF's activities both in Europe and in the United States. (CX 3508; 3509C; 3510E; 3511–14; 3603I, M, AA; Lipton 1607–09; Schober 1659–60; Whittemore 1999; 1946–47; 1948; Smith 1473–74).

628. The domestic competitors recognized BASF's strong position in phthalocyanines worldwide since its 1978 expansion of phthalocyanine plants in Germany and BASF's "potential to affect the domestic [phthalocyanine] market significantly." (CX 3401; 3415F 6014). Subsequent to BASF's European expansion, [***] (CX 3415G; [***] later withdrew from phthalocyanine business. [***] decided against exanding its domestic phthalocyanine production capacity in part because of BASF's worldwide position in phthalocyanines. (Lipton 1609–11).

629. BASF's introduction of the Paliotol line of pigments (particularly the isoindolines) also affected CIBA-GEIGY, which found [***] **[158]**[***] (Papillo 1836–38). Also Sun Chemical (CX 3113A–C) and American Hoechst (CX 3031I) [***].

630. Hercules cited BASF's technological capability and financial commitment to research and development as a factor in its decision to withdraw from the organic pigment business in the United States. (CX 3612W; Nicoll 10688–90).

D. *Entry Barriers Into The Organic Pigment Market Are Substantial But Entry Is Unimpeded*

631. There are no absolute or high entry barriers in terms of essential raw materials or production processes in the organic pigment market in the United States. (Glassman 8730–33). Phthalo-

cyanine crude, once in short supply, has been available at low costs for some years from Japanese importers. (Glassman 8733). *See* F. 238, *supra.* However, there are certain processes and skills which are difficult to master and are important to particular end-use industries, such as flushed colors for inks and high-technology pigment products for automotive coatings. (Whittemore 1799–1800).

632. Patents no longer play an important role in the organic pigment market. Most patents involving the more important new organic compounds have expired. Many successful firms operate without patents. (Glassman 8730–31).

633. The capital requirements for *de novo* entry into the organic pigment industry are substantial. An organic pigment manufacturing facility costs between $12 to $20 million. (Whittemore 1913–16; Canon 12544–46). Also planning, construction and outfitting of a pigment plant takes a few years. Sun Chemical's new organic pigment plant cost about $12 million, and was the first stage of a $30 million program announced in 1978. (Glassman 8735). Others, including Magruder have been able to expand at much lower cost. For example, Mr. Weissglass stated that a line of heavy duty mixers and mill can be added at about $500,000. (Weissglass 2541–42; Glassman 8735–40).

634. Generally speaking, the production of the so-called high-technology pigments involves more complex technology than the production of commodity pigments. Some high-performance pigments, such as phthalocyanines, are not regarded as high-technology pigments. (Papillo 1778–79). Most of the recent entrants offer technical excellence without producing high-technology pigments. *See* CX 3946G; F. 699. **[159]**

635. Government regulations in the fields of environment and workplace safety established during the recent years have increased the capital costs of entry into the organic pigment industry, as in many other industries. However, these regulatory costs are manageable and have not been a significant obstacle to entry or continued growth by new firms in the organic pigment industry. (Weissglass 2524). *See* F. 233, 235, 298–K, *supra;* F. 700, 702, *infra.*

636. Research and development is not a significant barrier to entry or continued growth in the organic pigment industry. There have not been any important breakthroughs in terms of new compound synthesis for some time, and many important patents have expired. As a result, only a small number of industry giants engage in R&D in the conventional sense, the majority devoting their research resources to applications research, development of matching pigment products for counteroffering, product modifica-

tion, and to technical service of their customers. *See* F. 255–66, 324, 550, 559, 561, 564, 567, *supra;* F. 699, *infra.*

637. Although a broad product line and capability to serve the needs of more than one user-industry is an obvious advantage, the product scope has not been a significant barrier into the organic pigment industry. On the contrary, most of the successful recent entrants have been those who established positions by specializing initially in one or two user-industries with relatively limited product lines and expanded their product scope as their businesses grew. *See* F. 280, 557, 562, 566, *supra;* F. 702, *infra* .

638. A well-trained marketing force backed by a competent technical service staff is essential in the sale of organic pigments, which is intensely user-oriented. It is difficult and time-consuming to develop this essential capability internally, but it is possible to recruit or hire away qualified personnel. The evidence shows that a seasoned marketing force backed by an able technical service staff can make the difference between growth and decline, or success and failure. *See* F. 276–78, *supra;* F. 702, *infra.*

639. Product differentiation is not a significant market factor in the organic pigment industry, which sells industrial products on the basis of cost and technical performance characteristics, and not brand names or advertising. (Glassman 8736).

640. The product approval system is a significant entry barrier in the automotive coatings segment of the market and can delay entry for a few years in that segment. *See* F. 279, *supra.*

641. Dr. Adelman, respondent's expert witness, expressed an opinion, based on RX 8018 (purporting to measure the relationship **[160]**between rate of return and market share), that there is no significant economies of scale in the organic pigment industry. (Tr. 10198). The record does not contain sufficient and reliable evidence on this issue. However, there is evidence tending to show that while some large producers have experienced low or negative profitability, most small producers have been profitable. *See* F. 686–704, *infra.*

642. During the last 20 years, American Hoechst has been the only major *de novo* entrant to become an upper-tier firm in the organic pigment market. However, there has been a number of entries at a smaller scale during the 1960's, which are now well entrenched, growing and profitable. *See* Counihan 3536–54. F. 637, *supra.* It is safe to conclude that these new entrants not only checked further concentration but also will begin to bring about a perceptible decline in the level of concentration in the market in spite of a number of reported mergers in the past few years. *See* F. 604, *supra.*

643. From the foregoing, it is found that entry barriers to the

organic pigment market are substantial but entry remains unimpeded.

E. *There Is Significant Product Heterogeneity In the Organic Pigment Market*

644. Because the organic product industry is highly user-oriented and serves a number of different user-industries, products are offered in many different forms, designed to meet diverse product requirements of customers. *See* F. 63–97, *supra.*

645. Apart from product specifications and standards, applications technology and technical assistance are important parts of the product-service package that users demand in the organic pigment industry. *See* F. 276–79, *supra.*

646. It is generally accepted that product heterogeneity can diminish the anticompetitive effects likely to flow from seller concentration and is therefore a relevant factor in evaluating the effects of a given merger. *See* IV *Antitrust Law,*¶ 919 at 91–93.

F. *The Organic Pigment Market As A Whole Is Characterized By A Low Level Of Buyer Concentration*

647. The general level of buyer concentration in the organic pigment market is low, except in the automotive coatings end-use **[161]**segment. The number of automotive coatings producers is small. (Glassman 9809–11; Kamerschen 10983).

648. Many users of organic pigments are technologically sophisticated, large firms which have substantial leverage as large volume buyers. Such firms include Celanese Corporation and Ford in automotive coatings, DuPont, PPG and Sherwin-Williams in architectural coatings, and Flint, Sun, and Sinclair and Valentine in printing inks. (Glassman 8764–65).

649. It is generally accepted that the presence of large buyers, fewness of orders and the ability of sellers to conceal price concessions for a time tend to drive prices down toward competitive levels even in a market where seller concentration is high. *See* IV *Antitrust Law,*¶ 918 at 89–91.

G. *Competition From Imported Organic Pigments Can Be Expected To Have A Moderating Influence Upon The Effects Of Seller Concentration*

650. Imports of organic pigments have undergone a dramatic increase during the recent years. And the ratio of imports to domestic consumption is substantial (about 11.5% in 1977), although there has been some year-to-year fluctuations. *See* F. 298–M, *supra.*

651. It is generally accepted that imported products increase competition and tend to have a moderating influence on prices.

Although four European companies control some three-fourths of all imports, the magnitude of imports by these firms, either individually or collectively, remain unpredictable from year to year, and imports can be reasonably expected to exert a beneficial influence on price competition. *See* F. 298–N–T, *supra.*

652. The inadequate productive or marketing resources of one of the merging firms is a mitigating factor in evaluating the competitive effect of a given merger and may be raised as a defense to show that they tend to lessen the competitive significance ordinarily inferred from their market shares. *Brown Shoe Co. v. United States,* 370 U.S. 294, 346 (1962); *General Dynamics Co. v. United States,* 415 U.S. 486, 501–02 (1974).

653. It has been suggested that such mitigating factors bearing on the merging firm's competitive vitality may save a merger "only **[162]**where they establish that market shares reflecting 'true' competitive potential would fall below the threshold for presumptive illegality." IV *Antitrust Law,* ¶ 939 at 131, ¶ 934a–b at 132–35.

H. *Because Of Chemetron/ALI's Disinvestment Policy Permitting Continued Deterioration Of CPD's Productive Facilities During The 1970s, CPD's Market Shares Tend To Overstate Its Competitive Potential In The Organic Pigment Market*

654. Chemetron and ALI, the successive owners of CPD during the 1970s, lacked a clear commitment to the organic pigment industry and permitted CPD's productive facilities to deteriorate steadily over the years by failing to provide capital necessary to adequately maintain and bring such facilities reasonably up to date. *See* F. 339–78, *supra.*

655. Dr. Adelman, respondent's expert witness, concluded, based on his "disinvestment" analysis and other record evidence, that:

> Well, they were an ineffective decreasing competitor and their current market shares was probably a biased predictor, an over predictor of their subsequent market shares. That would be the estimate I make on the basis on the figures that stop in 1978, and it seems to me that the developments other than in the years following do bear out that kind of prediction, because the market share of Chemetron, if you make allowance for the addition of the BWC share, those continue to decrease just as these numbers would predict it would decrease. (Tr. 10,190).

656. Regarding CPD's competitive vitality, Mr. Panush of Celanese Corporation stated that it was his impression that CPD was [***] (Panush 2318). And Mr. Whittemore of Sun Chemical testified that CPD was going downhill prior to the acquisition, in the period starting in the late 1960's and continuing into the 1970's and that the "Huntington plant was increasingly in bad shape from the standpoint of maintenance, from the standpoint of industrial rela-

tions, and that it wasn't being supported with additional investment." (Whittemore 1994). **[163]**

I. *There Is Evidence Which Suggests That BASF/BWC's Marketing And Technical Service Capabilities In The United States Were Ineffectual*

657. Sol Panush, Manager of Color for Plastics and Specialties Division of Celanese Corporation (a coatings producer and a customer of BWC), who has over 30 years of experience in purchasing pigments (Tr. 2196–99, 2252), testified in the case-in-chief that supplier integrity is an essential element in a buyer's decision to purchase. (Panush 2209). It is not easy for a manufacturer to establish supplier integrity and it takes a long time. (Panush 2211).

658. Six characteristics of integrity are: (1) ability to respond quickly and accurately, (2) ability to communicate accurately, (3) ability to produce what is promised, (4) ability to maintain a product standard for a long time, (5) believeability, and (6) ease of relationship. According to Mr. Panush, BWC failed in these areas: ease of relationship, ability to respond quickly and proper communications. (Panush 2324–25).

659. According to Mr. Panush, [***] (Tr. 2314–15). Mr. Panush rated BWC's technical service [***] (Panush 2312, 2370–71). [***] (Panush 2313).

660. [***] (Panush 2308).

661. Dr. Erwin F. Hahn of BASF testified that there were instances when BWC did not have enough pigments on hand, requiring that shipments be rushed in by plane and that pigment shipments were sometimes delayed by dock strikes. (Hahn 3974–75).

662. Dr. Josef F. Kohnle, Group Vice-President of BWC, discussing the period 1975–1978, stated that BWC was not considered a **[164]** reliable supplier by United States customers. (Kohnle 4402, 4404). He testified that BWC's difficulties in selling imported pigments would have been eased by higher prices in the United States, but the problem [***] (Kohnle 4500–01). He also mentioned the difference between the vehicle systems used in the United States and Europe. (Kohnle 4409). *Also see* F. 189–98, *supra.*

663. Dr. Albers of BASF testified that [***] (Albers 6188). And Dr. Erich Stoeckl, BASF AG's head of pigment production, testified that BASF AG's pigment production in Ludwigshafen [***] *Also see* F. 425, *supra.*

J. *BASF's Worldwide Market Position And Its Financial And Technological Resources Relied On By Complaint Counsel As Indicating That Competitive Significance Of BWC Is Understated By Past Market Shares*

664. BASF is a leading producer and marketer of organic pigments worldwide and has abundant financial resources. F. 2–6, 386–89, *supra.*

665. BASF also has unsurpassed technological resources. It conducts well-financed R&D programs both basic and product development. Its recent product developments are among the most significant advances in pigment technology. F. 397–403, *supra.*

666. Inspite of its worldwide market position, abundant financial resources and technological capabilities, BASF/BWC's market share in the United States organic pigment market has remained insignificant for many years, demonstrating that those desirable attributes of BASF have in fact had little effect upon BWC's pre-acquisition market shares.

667. The record is devoid of any clear evidence of recent new products or processes, or any clear evidence of domestic expansion by BASF/BWC that is not yet reflected in BWC's pre-acquisition market shares. *See* IV *Antitursť Law,* ¶ 937 at 142–43. **[165]**

VIII. THE EVIDENCE RELATING TO MARKET PERFORMANCE SHOWS THAT THE ORGANIC PIGMENT INDUSTRY IS COMPETITIVE

A. *The Organic Pigment Market Is Characterized By Vigorous Price Competition*

668. The record shows that there is no significant price leadership in the organic pigment market in this country, price-cutting and off-list sales are common occurrences, and smaller firms are particularly effective price competitors.

669. Harold Whittemore, senior vice-president of Sun, testifying in the case-in-chief, stated that prices in the organic pigment business have not kept up with inflation. [***] it was the small competitors, such as Magruder, Apollo, Pope and Allegheny, that were particularly effective price competitors. (Tr. 1975–76).

670. Allan Weissglass of Magruder, testifying in the case-in-chief, stated that considerable price-cutting occurs in the industry. (Weissglass 2525). Herbert McKenzie, President of the Hilton-Davis Division of Sterling Drug, characterized the industry as "price competitive." (McKenzie 6959). Dr. Canon, former Vice-President of Harshaw, testified that the phthalocyanine segment has been chaotic pricewise. (Canon 12,520).

671. Eli Aschner, former marketing manager of BWC-PIC, testified that the organic pigment business was a very price-competitive business, that selling below list prices was "very common," that there was a substantial amount of off-list selling in the market, and that, as documented in RX 1338A, "list prices are rarely what customers pay for any toner." (Tr. 5334-35, 5338, 5407–11). He also testified during his deposition that BWC sold below list-prices to meet competition. (CX 5084CC). Also, Dr. Kohnle of BWC testified that there are many sales off the list and that discounts varied from one product to another. (Kohnle 4501–03). *Also see* Counihan 5643, 5691; Albers 6190.

672. The Sun 1977–1982 Long Range Plan, in assessing Sun's major competitors, noted that many firms competed on the basis of pricing, for example: [***] **[166]**[***] (CX 3107).

673. An American Hoechst Semi-Annual Report for 1976 commented that there were pricing battles with respect to different pigments [***] (RX 6003J). An American Hoechst document assessing the diarylide yellow market notes that [***] (CX 3009M) and observed that [***] (CX 3009N).

674. An American Cyanamid study prepared for American Hoechst in December 1979 commented that green shade phthalocyanine, [***] (CX 3023Q).

675. CPD's 1978–1982 Long Range Plan (CX 2047) noted that the ink industry, CPD's primary end-use market, is highly price competitive, [***] (CX 2047E–F).

676. In a June 5, 1978 letter to Dr. Hahn of BASF AG, Mr. Aschner of BWC reported that the BWC list price for phthalocyanine Green 7 was [***], and that competitors such as DuPont were selling the same pigment for [***] (CX 763). In a similar vein, BWC's September 1978 Monthly Report (CX 258) reported [***] in the coatings and plastics segments. (CX 258C). BWC's January 1979 Monthly Report anticipated that [***] (CX 278C).

677. Mr. Glassman, respondent's expert witness, opined that the diversity of prices and diversity of price changes, as well as the inability of organic pigment sellers to maintain list prices, suggested strongly that no tacit arrangement to restrict competition and to limit output existed. (Glassman 8767–68). Mr. Glassman also testified that the absence of price leadership (Tr. 8777–79) and the absence of collusion among pigment manufacturers (Tr. 8763) supported **[167]**his opinion regarding the highly competitive nature of the industry. *Also see* Adelman 10,193.

B. *There Is Evidence Of Overcapacity In The Organic Pigment Industry Which Tends To Spur Price Competition And Depress Profitability*

678. There is a clear perception among industry witnesses that there is overcapacity in the organic pigment industry in the sense that production capacity is significantly larger than demand for the products.

679. Michael P. Parker, former marketing manager of pigments of ICI, Limited and now its Business Manager of Dyestuffs and Intermediates, Organics Division, testified that for the years 1976–1977 and 1980, a period when he had first-hand knowledge of the organic pigment industry in the United States, there was "fairly significant overcapacity" in the industry. (Parker 4955). Sol Panush of Celanese, testifying in the case-in-chief, stated that there was overcapacity in the organic pigments industry in the late 1970's, particularly in phthalocyanines. (Panush 2358). And Allan Weissglass, President of Magruder Color, testifying in the case-in-chief, stated that he believed there has been excess capacity in the organic pigment industry from the late 1970's to date. (Weissglass 2527).

680. Heinz Geiss of American Hoechst, testifying in the case-in-chief, stated that at least since 1975, overcapacity in the organic pigments industry in the United States has led to intense price competition [***] (Geiss 2134). *Also see* Kohnle 4465; Albers 6189.

681. Dr. Malchick of BWC testified that overcapacity has existed at least "since the Sun Plant at Muskegon has been on stream, but I think that also adds with the other expansions that the smaller companies have come on with over a period of five to ten years." (Tr. 3324).

682. Jerome Counihan, former president of CPD, described a series of events in the last decade and a half which contributed to the increase in industry capacity, including the 1967 announcement by DuPont of its plan to build a multi-million dollar plant to produce [168]quinacridone pigments (Tr. 5539), the dramatic increase in the importation of low cost phthalocyanine crude from Japan, and the willingness of the importers to teach purchasers the technology needed to finish the crude into pigment form. This development allowed four new companies, Apollo, Pope, Sun and Magruder, to enter into the sale of phthalocyanine pigments. (Tr. 5539–40). Mr. Counihan also stated that DuPont announced a doubling of its phthalocyanine blue production in 1970, that American Cyanamid expanded its azo pigment plant in 1975 and that American Hoechst doubled the capacity of its azo pigment plant in 1976. (Counihan 5542–43).

683. Complaint counsel's exhibits in evidence tend to support the testimony that the organic pigment industry has overcapacity. A 1974 [***] evaluation of the phthalocyanine industry warned of the problem of overcapacity in the future. (CX 3603N, AA). In a 1975 operating report, [***] recognized that the organic pigment industry has always had sufficient capacity to meet demand. In certain areas where a minimum of technology is required, over-supply has deteriorated the price structure to the point where some manufacturers withdrew. (CX 186F). In December 1978, an [***] study noted that there is general overcapacity in the industry. (CX 3007G). [***] recognized in 1978 that [***] (RX 6015K). *See also* CX 3846Y, WW.

C. *The Organic Pigment Industry Is Characterized By Subnormal Profitability*

684. It is a generally accepted theory of industrial organization economics that persistently high or supra-normal returns over time signifies market power and a likelihood that the market is not performing competitively, while persistently low or subnormal returns over time negates market power and a likelihood that the market is not performing competitively. *See* Glassman 8794–95; Kamerschen 11,630–33; II *Antitrust Law,* ¶ 508–509 at 331–33.

685. It is also recognized that accounting or "book" rates of return may not reflect true economic rates of return and that, for the purposes of assessing market power and industry performance, the former is less meaningful than the latter. However, proper measures of the latter are disputed and further theoretical and empirical research is believed to be necessary before rates of return can be **[169]**measured reliably and interpreted with certainty. *See* Kamerschen 11,020–31; II *Antitrust Law,* ¶ 512c at 336–37, ns. 4 and 5.

686. There was a clear perception among industry witnesses that the organic pigment industry has experienced low profitability, and high-level executives of several large firms in the market testified that their profitability was low or marginal and sometimes negative. Similar comments are also found in some marketing documents. Respondent's expert witnesses concluded, on the basis of the above evidence and an industry profitability study they prepared, that the rate of return of the industry was relatively low.

687. [***] testified in the case-in-chief that [***] had sizeable losses in each of the years from 1975 through 1978, and that his company considered alternatives, [***] (CX 3007; [***]). The participation of [***] And an employee of [***] in a trip report prepared in April 1978, found the organic pigment and dyes industry in the United States "characterized by a completely unsatisfactory reurn situation." (CX 3002B).

688. Paul Papillo, Vice President of CIBA-GEIGY Plastics and Additives Division, testified that specialty pigments (which are also high-technology pigments) are more profitable than what he described as "commodity" pigments. He classified phthalocyanines as commodity pigments. (Tr. 1778–79).

689. Herbert McKenzie, President of Hilton-Davis Division of Sterling Drug and former General Manager of the Color Department, Pigment Division, American Cyanamid, characterized the industry's profitability as mediocre. (McKenzie 6933). A 1977 [***] study of the printing ink industry found that [***] (RX 6526C).

690. [***] 1979 report prepared for [***] in connection with a possible purchase by the latter of its [***] business, stated that the business had "limited current profitability." (CX 3024E).

691. William O. Nicoll, former General Manager of the Coatings and Specialty Products Department of Hercules, called as a witness by [170]complaint counsel in rebuttal, testified that the pigment business, during the period 1975 through 1978, "was not as profitable as some of the other Hercules businesses." (Nicoll 10,685).

692. [***], testified that sales and manufacturing margins in phthalocyanines had declined since the early 1960's and that there was no prospect of suitable profits in the phthalocyanine business. [***] His testimony is supported by CX 3846(5)J, a report on phthalocyanine production prepared by an outside consulting agency.

693. Sol Panush of Celanese, a purchaser of organic pigments, testified in the case-in-chief that he regarded the organic pigment industry as "a low profitability industry." (Panush 2358).

694. [***] study of the organic pigment business completed in May 1978, concluded that [***] (CX 3308B).

695. Jeffrey M. Lipton, former director of DuPont's Colored Pigment Production Division, who testified in the case-in-chief, stated in a speech to the National Paint and Coatings Association in October 1979:

> I could describe our industry as one where companies are today earning relatively low returns on generally old, marginally maintained facilities - utilizing sometimes ancient technology and black art to make specialty chemicals that are too often treated like commodities and are sold into low growth markets. (For example, in the U.S., the coatings and ink industries, both growing very slowly overall, represent about 75% of the demand for pigment colors.) (CX 3218D).

696. Dr. Josef F. Kohnle, Group Vice-President of BWC, testified that the pigments industry is an industry with "low profitability or no profitability." (Kohnle 4462). Jerome Counihan, former President of CPD, stated that the organic pigments business is highly

competitive and that profits are "less than [are] desirable" [171]for any type of pigment company of any size. (Counihan 5560–61). *Also see* Malchick 3312–13; Aschner 5507.

697. Dr. Hans Albers, head of BASF America and member of BASF AG's Vorstand (Board of Directors) with responsibility for, among other operations, BASF's pigment production and sales, testified that BASF AG's organic pigment export business in the United States [***] (Albers 6189, 6191). *See* RX 15D–E; 26J–K, O, S, X; 27B, F; 28B–C, 2950KKKK–LLLL. *Also see* Hahn 3959–63.

698. Mr. Glassman, respondent's expert witness, expressed an opinion, based on an industry profitability study he conducted (RX 2131, revised August 19, 1981), that the organic pigment market had relatively low rates of return for the years 1973–1978, and that the rates were substantially lower than those for all manufacturing companies, for companies in "chemicals and allied products," or for companies in "industrial chemicals and synthetics." (Glassman 8943–54). While the Glassman profitability study was based on more data than is ordinarily available to students of industrial organization economics and thus provides information of value, its data base is ill-defined, incomplete and mixed and its probative value is limited. However, Mr. Glassman's view of low profitability is generally in accord with other testimonial and documentary evidence in the record.

D. *Smaller Firms Are Growing Rapidly And Generally More Profitable Than Larger Firms*

699. Mr. Geiss of American Hoeschst testified in the case-in-chief that small companies like Apollo, Pope, Magruder, Industrial Color, Roma Chemicals, and Max Marx, Uhlich seem to have grown faster than some of the bigger companies. (Geiss 2171–72). Among American Hoechst's competitors, Mr. Geiss named such large companies as DuPont and Sun as well as such smaller companies as Harmon, Hilton-Davis, Magruder, Harshaw, Industrial Color, Pope and Apollo. (Geiss 2160–61). He also testified that there is no need for vertical integration or a full product line for a company to be successful in the organic pigments industry and added that [***] (Geiss 2170–71). He further testified that smaller firms were among the first to duplicate and offer Hoechst's HR yellow-type pigments when the Hoechst patent expired in the mid-1970's and that they did so years earlier than either CPD or Sun Chemical. (Geiss 2080–85).

700. Both Dr. Hugh Smith and Mr. Whittemore of Sun, testifying in the case-in-chief, stated that the smaller firms such as Apollo, [172]Pope and Magruder were well able to cope with increasing regulatory pressures. (Smith 1537; Whittemore 1995).

701. Erhard Schober of Mobay testified in the case-in-chief that a broad product line is not necessary for success in the pigments industry and that Apollo and Pope are among the "major" producers of phthalocyanines in the United States. (Schober 1738–40).

702. Allan Weissglass, President of Magruder, testified that Magruder's production capacity and volume of sales has increased steadily from the mid-1960's to the present and that in the past three or four years, Magruder's dollar sales have increased almost [***] a year. The industry is not growing as fast as Magruder has, and Magruder's growth has thus come at the expense of other manufacturers' market share. (Weissglass 2520). Mr. Weissglass described Magruder as a successful competitor in the organic pigments industry and attributed his success to a good marketing team backed with the investment and people in production needed to do the job. (Weissglass 2523). Magruder does a particularly good job in matching competitors' products and has "innovated" better or improved colors especially in the flushed area. (Weissglass 2523–24). Magruder produces high quality pigments with a lean organization which has a minimal overhead. Environmental restrictions have not posed any great obstacles to Magruder's growth in recent years. (Weissglass 2524). Now that American Cyanamid has divested its phthalocyanine line, Magruder's product line of flushed pigments for the printing ink end-use is broader than either DuPont or American Cyanamid. (Weissglass 2526). In Mr. Weissglass' opinion, the smaller companies in the organic pigments industry have grown satisfactorily. (Weissglass 2527). Mr. Weissglass also considered Sun, Apollo, Pope and Magruder to be the best innovators in the flushed color area. (Weissglass 2530–31).

703. Jerome B. Giniger, Vice President of Marketing, Pope Chemical Company, testified that Pope was one of the smaller producers of organic pigments, "but growing rapidly." (Giniger 7207). As an indication of Pope's low overhead, more than [***] of its employees are actually engaged in production. (Giniger 7215). [***] (Giniger 7210). [***] *Id.* Since 1973, Pope has been expanding its business at a rapid rate and has bought a major piece of new equipment almost every year. (Giniger 7213). Mr. Giniger attributed Pope's success to the fact that "we run a very efficient plant and we spend a lot of [173]time in finding, hiring, training and motivating the right kind of people, and quality in service, responding to our customer's needs." (Giniger 7216). Mr. Giniger further testified that Pope, "as an indication of our conviction and optimism concerning this market, made a very concerted effort to acquire the American

Cyanamid pigment operation, which is a substantial operation." (Giniger 7214).

704. Mr. Counihan, former President of CPD, testified that during the 1970's Magruder has been the "fastest growing pigment company in the United States," and that both Apollo and Pope have expanded their sales volume appreciably and have taken increasing market shares in the flushed color industry. (Counihan 5555, 5560). He also testified that the greatest strength that smaller companies have is their low overhead, coupled with the fact that they are very flexible in meeting changing demands because of the fact that they are managed by only one or two people and can reach important decisions swiftly. (Counihan 5782–83).

705. Dr. Malchick of BWC testified that Apollo, Pope and Magruder are small independent companies which have grown relatively rapidly in the last five to ten years, not only in sales volume but in capability. (Malchick 3075–76). Accordingly to Dr. Malchick, Ridgway, a subsidiary of Sinclair and Valentine, had been less aggressive in the past but is currently undergoing an expansion and will probably be more aggressive in the future. (Malchick 3077).

706. An important factor contributing to the success of these relatively small producers in the flushed pigments arena has been the dramatically increased quantity of phthalocyanine crude imported from Japan. Since the Japanese importers needed customers for their crude, they taught smaller companies the techniques needed to finish the crude into a saleable pigment. According to Mr. Counihan, since the price of imported crude is lower than the cost of producing similar crude domestically, the small companies are able to compete successfully, and the importers have a ready market for their crude. Mr. Counihan also testified that both BASF AG in Germany and BWC in the United States now purchase phthalocyanine crude from Japan. (Counihan 5541).

707. When BWC's South Kearny pilot pigment facility was closed, BWC learned that [***] were all willing to produce phthalocyanine presscake for sale by BWC at a cost which, it was thought, would allow BWC to make a small profit on resales, and [***] was actively seeking this business because it had recently tripled its plant size. (CX 630K–N). **[174]**

IX. THE EVIDENCE RELATING TO FACTORS OTHER THAN MARKET SHARES AND CONCENTRATION IS SUFFICIENT TO OVERCOME THE PRESUMPTION OF ILLEGALITY IN THIS CASE

708. The finding of presumptive illegality with respect to the

challenged acquisition was based on a low (10%) threshold. There is some authority which would raise the threshold level to 13–17% of the market where one of the parties has no more than 2% of an unconcentrated market. F. 580, *supra.* The organic pigment market is concentrated, albeit moderately. F. 584–90, *supra.* In these circumstances, the presumption of illegality of this merger was a relatively weak one. *Cf.,* IV *Antitrust Law,*¶ 910a at 54 (the authors characterize the 10% aggregate share rule as "marginal"), ¶ 922 at 97 (the authors characterize a 10% aggregate share rule as "tenuous").

709. The record does not contain clear quantitative evidence to establish that the market shares reflecting "true" competitive potential of the merging firms would fall below the threshold level for presumptive illegality in this case. *Cf., United States v. Consolidated Foods Corp.,* 455 F.Supp. 108, 136 (E.D. Pa. 1978) (the court allowed a merger of 7%- and 3%- firms because of evidence of "steady and precipitous rate of decline" in sales of one of the merging firms). *See* IV *Antitrust Law,*¶ 934 at 132–35.

710. It is found that the nature and quantum of the record evidence relating to market factors other than seller concentration (F. 608–53, *supra*), to factors affecting the significance of market shares (F. 654–67, *supra*), and to industry performance (F. 668–707, *supra*), collectively and cumulatively, are sufficient to overcome the adverse presumption based on the market share evidence. *Cf., United States v. General Dynamics Corp.,* 415 U.S. 486, 501–02 (1974).

X. THE POTENTIAL COMPETITION ASPECT OF THE CHALLENGED ACQUISITION

A. *BASF/BWC Was A Potential Entrant Into The United States Organic Pigment Market*

(1) *BASF/BWC Possessed Adequate Financial And Technical Resources To Enter The Organic Pigment Market*

711. The evidence is clear that BASF/BWC possessed adequate financial resources and capabilities to enter the organic pigment market in the United States. *See* F. 4, 387–403, 454–61, *supra.* **[175]**

712. The evidence is clear that, although there are significant differences in some pigment products and pigment systems between Europe and the United States, BASF/BWC possessed adequate technological resources and capabilities to expand internally its participation in the United States organic pigment market. *See* F. 711, *supra.*

713. The evidence is clear that, although BWC's existing market-

ing staff suffered from some deficiencies with respect to some user segments in the organic pigment market, BASF/BWC had sufficient resources and capabilities to remedy the situation. *See* F. 411–18, 659–63, *supra.*

(2) *BASF/BWC Was Determined To Become A Substantial Factor In The United States Organic Pigment Market One Way Or Another*

714. The evidence is clear that BASF/BWC was determined to become a substantial factor in the United States organic pigment market, commensurate with its position in the world market in colorants. *See* F. 448–51, *supra.*

715. BASF/BWC has over the years attempted to expand its participation in the United States organic pigment market through construction of domestic production facilities and/or acquisition of an established producer-marketer of organic pigments. *See* F. 466–500, *supra.*

716. At and about the time of the acquisition challenged herein, BASF was leaning toward an acquisition of an established domestic organic pigment producer because of a perceived economic unattractiveness of *de novo* expansion in the United States. *See* F. 466–68, 476–77, 486–88, *supra.*

(3) *BASF/BWC Had A Unique Incentive For Domestic Production Of Organic Pigments Because Of A Perceived Low Profitability Of Its Organic Pigment Import Business*

717. BASF's management had a perception that its organic pigment import business in the United States yielded unsatisfactory or low profits. **[176]**

718. Dr. Hahn, former general manager of BASF America and now director of BASF AG's Dyestuffs and Pigment Research Laboratory, testified that the Colors and Auxiliaries Division of BWC as [***] when he was put in charge of its operations in 1970. (Hahn 3955–56, 3959). RX 556, the 1974 Five-Year Plan of the Colors and Auxiliaries Division (which includes CPI) generally reflects the [***] (Hahn 3996). Dr. Hahn also testified that if BWC did not make the transition from imports to domestic production, it would stay at best a marginal factor in the industry. (Hahn 4009).

719. [***] is a BASF/BWC term which signifies net revenue (net sales less direct overhead charges) less cost of production, costed interest on inventories, costed interest on receivables, foreign exchange rate cost and selling expense. It approximates "gross profit." Thus, [***] does not include all of the overhead expenses. *See* Albers 6317; Tschirch 5210.

720. Dr. Albers, a member of BASF AG's Board, testified that [***] (Albers 6255–56).

721. Mr. Muench testified during his deposition that when he became Sparte CP director on January 1, 1978, he felt that the pigment export business to the United States was [***] (Muench 3793–96).

722. Dr. Kohnle, who succeeded Dr. Hahn at BWC, testified that BWC was [***] when he arrived in the United States from Germany in 1976. He stated that the pigment business [***] (Kohnle 4396–98). He testified that the Colors and Auxiliaries Division, which included organic pigments, [***] (Kohnle 4400–01). He testified that he believed imports of organic pigments [***] (Kohnle 4401, 4404). *See* CX 5091H–J. *See also* [***] CX 152A–B, E–F; 155L; 162Q–S, V, Y, FF–HH; 163H; 164A, F–G; 184P; 187UU–VV; 220F; 280A; 283A; 291GG.

723 The testimony and documents of BWC's foreign competitors tend to show that it was difficult to compete in the organic pigments business via imports in the period preceding the acquisition. **[177]** Michael Parker of ICI testified that, "I think it [profitability] varies year to year, but a fairly reasonable comment would be around the break-even level, measured in conventional terms." (Parker 4948–49).

724. [***] (Geiss 2131–32, 10,694, 10,703). He agreed that among the factors contributing to [***] (CX 3007B, D; Geiss 10,712).

725. The evidence shows that [***] specialty pigments (patented products or other high-technology pigments not made by domestic producers in the United States) were generally [***] import sales of other organic pigments. *See* RX 6015D; Geiss 10,700–11.

726. Mr. Papillo, a vice president of CIBA-GEIGY, testified in the case-in-chief that CIBA-GEIGY was faced with the choice of remaining in the business in the United States on an import basis and continuing to operate at a loss in the hope that the exchange rate would turn around or building a "greenfields" (*de novo*) plant in the United States in order to improve its profitability. CIBA-GEIGY rejected both alternatives. (Papillo 1875–80). CIBA-GEIGY subsequently acquired the organic pigment business of Hercules. *See also* CX 3001D [***].

727. The perceived or real unprofitability of BASF/BWC's import business gave BASF a strong, added incentive to produce organic pigments in the United States. *Also see* F. 432–47, 697, *supra.*

B. *The Elimination Of Potential Competition By BASF/BWC's CPD Acquisition Was De Minimis*

(1) *The Need To Preserve Potential Competition In the Organic Pigment Market Is Not As Important As It Would Be In A Highly Concentrated Industry.*

728. There is considerable support for the argument that the preservation of potential competition becomes important only in those [178]markets where the seller concentration is high. *See United States v. Marine Bancorporation,* 418 U.S. 602, 630–631 (1974); Turner, "Conglomerate Mergers and Section 7 of the Clayton Act," 78 Harv. L. Rev. 1313, 1386 (1965).

729. The organic pigment market is competitively structured. *See* F. 581, *supra.* The evidence relating to market performance indicates that the organic pigment market is competitive. *See* F. 668–707, *supra.*

(2) *There Were Other Potential Entrants/Expanders In The Organic Pigment Market*

730. Sandoz, Dainichiseika, Dainippon, and Toyo all large foreign manufacturers of organic pigments, attempted to enter the United States market either by an acquisition or a joint venture. (Sweeney 7375–76; McKenzie 6933–35). *Also see* Stipulation Between Counsel Concerning Reports of Companies, dated February 22, 1982.

731. There are a number of other foreign and domestic organic pigment manufacturers which possess resources and capabilities necessary to enter or expand in the organic pigment market. Such firms include: ICI, Gulf Oil Corp. (which owns Harshaw Chemical, an organic pigment producer); United Technologies Corp. (which owns Inmont, a producer of organic pigments) (CX 3946); and Montedison, a large French chemical firm. (Whittemore 1990).

C. *BASF/BWC's Acquisition Of CPD Was A Toehold Acquisition And May Be Procompetitive*

732. BASF/BWC's acquisition of CPD, which had about 10% or less of the organic pigment market, was a toehold acquisition. *See Budd Co.,* 86 F.T.C. 518, 580–81 (1975); II Areeda and Turner, *Antitrust Law,*¶ 536f at 430–31.

733. There is some evidence which suggests that the challenged acquisition would have procompetitive and synergistic effects by combining a small factor with marketing difficulties and a well-established firm suffering from chronic disinvestment. *See* F. 380–85, *supra.* [179]

Discussion

A. *Introduction*

This case involves the 1979 acquisition of Chemetron Pigments Division (CPD), the fourth-ranking firm in the organic pigment market with a 1978 market share of [***], by BASF Wyandotte Corporation (BWC), an importer-reseller of BASF AG pigments and the 16th-ranking firm with a 1978 share of [***] thereby making BWC the third-ranking firm with a combined share of about 10.6%.

BWC's CPD acquisition is notable in two respects. *First,* it is a horizontal acquisition involving a major firm in a concentrated industry. *Second,* this acquisition, together with the 1979 acquisition by CIBA-GEIGY Corporation of the pigment business of Hercules Corporation, marks the transformation of the four European chemical industry giants from importers-resellers of European-made specialty pigments into producing members of the United States organic pigment industry.

The BWC-CPD merger is a presumptive violation of Section 7 inasmuch as it resulted in an aggregate market share of over 10% in a concentrated market. However, the record evidence relating to the various non-market share factors pertaining to this merger and the competition in the organic pigment industry convincingly demonstrates that the market structure evidence did not accurately depict the economic characteristics of the industry and that the industry is competitive. In my view, respondent has met the burden of overcoming the presumption of illegality. It is also my view that even if the submarket complaint counsel advance (phthalocyanine pigments) were accepted, raising the aggregate share to 15.5%, the ultimate outcome of this case should remain the same.

A brief discussion of the main issues in this case follows.

B. *The Product And Geographic Markets*

Although respondent represented to the Federal Trade Commission during the pre-complaint investigation that the effects of this merger should be evaluated in terms of an organic pigment market (F. 199), respondent vigorously contested the product market issue at trial and suggested that colorants, embracing organic and inorganic pigments and dyes, constituted the only appropriate market for the purpose of evaluating the effects of this merger. Complaint counsel, on the other hand, contended that organic pigments constituted a valid Section 7 market and that phthalocyanine pigments, as a group, constituted an appropriate submarket. [180]

The evidence suggests that "all colorants" *might* be a valid product market in a case where both the merging firms sold organic

and inorganic pigments and dyes in competition with each other. In this case, however, CPD's only business was organic pigments. And the evidence is clear that organic pigments as a group constitute an appropriate product market, in terms of industry and public recognition of the market as a separate economic entity, the products' peculiar characteristics and uses, unique production facilities and distinct prices. (F. 201–21). *Brown Shoe Co. v. United States,* 370 U.S. at 325.

Although no single organic pigment can be a complete substitute for another organic pigment and, understandably, the price sensitivity evidence is mixed, there can be no serious dispute about the fact that the organic pigments industry is universally recognized as a distinct and economically significant entity and that the physical and functional characteristics of organic pigments and their uses are such as to constitute organic pigments as a single product market and to distinguish them from inorganic pigments and dyes.

The interpigment competition disclosed in this record, while arguably indicative of greater use of computer-programmed color-matching across the organic/inorganic division in some user-industry segments in the future, falls far short of obliterating the clear separation of organic pigments from inorganic pigments established by the evidence. (F. 144–64).

With respect to phthalocyanine pigments, a submarket advanced by complaint counsel, the evidence is insufficient to establish them as a Section 7 submarket. Apart from the fact that phthalocyanines are important and versatile pigments, the recognition of this subgroup of organic pigments as a separate economic entity is woefully lacking in this record. References to "phthalocyanine market" found in some marketing documents do not make phthalocyanines a product market in this case in light of other salient evidence on the issue. Fatal to complaint counsel's position is the clear evidence of a remarkable degree of interchangeability of production and distribution facilities across all organic pigments, including phthalocyanines. (F. 49–62, 98–101, 220, 276–79). *See Budd Company,* 86 F.T.C. 518, 572 (1975). In these circumstances, "phthalocyanine submarket" represents an unwarranted fragmentation of the product market and should be rejected.

Finally, the so-called disputed pigments (F. 119–40) can reasonably be separated from the organic pigments here, in terms of trade usage, their production and distribution, prices and users. In any event, their inclusion in the organic pigment market will not significantly alter the market share analyses set forth in this Initial Decision. [181]

The parties agree that the United States, Puerto Rico and the Virgin Islands constitute an appropriate geographic market in which to assess the effects of the BWC-CPD merger. (F. 222).

C. *The Challenged Acquisition Is A Presumptive Violation of Section 7*

The acquisition challenged in this case involves absorption by BWC of CPD, a competitor, in the organic pigment market. The intense congressional concern about anticompetitive mergers which led to the enactment of the amended Section 7 in 1950, as underscored by the Court in *Brown Shoe,*[8] mandates an early intervention against horizontal mergers producing substantial market share aggregations. In *Philadelphia National Bank,*[9] the Court, embracing the economic theory of oligopoly, determined that substantial market shares are proper bases for presuming the illegality of horizontal mergers. In *General Dynamics* and *Marine Bancorporation,*[10] the Court clarified the nature of other factors bearing on competitive significance of particular mergers which may be shown in order to rebut the presumption of illegality. Subsequent merger litigation delineated the substantiality of the threshold levels of aggregate shares for presumptive illegality.[11] In all, Section 7 jurisprudence of the last three decades has evolved a rule, now generally accepted, that horizontal mergers producing aggregate market shares of 10% or more in unconcentrated markets are presumptively illegal. This rule should govern the instant case.[12] [182]

The 1979 horizontal merger challenged in this case involves an aggregate 1978 share of 10.6% in the organic pigment market, which was moderately concentrated, and is a presumptive violation of Section 7.[13] (F. 584–90).

D. *The Organic Pigment Market Is Concentrated*

The 4– and 8–firm concentration ratios in the organic pigment market were 49.2% and 71.4% for 1977, 47.3% and 71.2% for 1978, and 49.6% and 76.4% for 1979, respectively. Thus, the organic

[8] *United States v. Brown Shoe Co.*, 370 U.S. 294, 311–23 (1962).

[9] *United States v. Philadelphia National Bank*, 374 U.S. 321, 362–67 (1963).

[10] *United States v. General Dynamics Corp.*, 415 U.S. 486, 494–504 (1974); *United States v. Marine Bancorporation*, 418 U.S. 602, 631–32 (1974).

[11] *E.g., United States v. Amax*, 402 F. Supp. 956, 958–959, 964–65, 972 (D. Conn. 1975).

[12] The rule of presumptive illegality with respect to horizontal mergers is based on the teachings of the theory of oligopoly, Section 7 case law and enforcement guidelines, and attempts to promote administrative or judicial efficiency, as well as consistency and predictability in merger law enforcement. *See* IV *Antitrust Law*, ¶ 908–15 at 26–83; Sullivan, *Antitrust*, at 616–21.

[13] The District Court which enjoined the Rhinechem-CPD merger found that the market share evidence showed the aquisition fell within the suspected category. The combined market share of the merging parties was not disclosed in the opinion, but it is believed to have been between 10 and 15%. *FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 789 (N.D. Ill. 1978).

pigment industry was moderately concentrated at the time of the challenged acquisition. It fell within Kaysen and Turner's "Type I oligopoly," or somewhere between "loose" and "tight" oligopolies.[14] And, for 1977 and 1978, the 4–, 8– and 20–firm concentration ratios of the organic pigment industry were somewhat higher than the corresponding average concentration ratios for all manufacturing industries in the United States. (F. 590–91).

On the other hand, the organic pigment market had between 32–43 firms with market shares ranging from less than 1 to about 15% during the period 1977 through 1979. Areeda and Turner would characterize such a market as "competitively structured."[15]

Furthermore, BWC, one of the merging firms, was an insignificant factor in the market, with less than 2% of the market. For the purpose of a presumptive ban, Areeda and Turner would raise the threshold level for a merger involving BWC to about 14–17%.[16]

Finally, the evidence does not show a discernible trend toward greater concentration or an undue reduction in the number of sellers in the organic pigment market, attributable to mergers or otherwise. (F. 602–05). Therefore, the presumption of illegality of the [183] challenged acquisition based on a low threshold level of 10% is marginal or relatively weak.[17]

The rule of presumptive illegality of horizontal mergers discussed hereinabove assumes that other factors bearing on the competitive consequences of particular mergers may be demonstrated in rebuttal. We shall examine first a number of market factors other than seller shares, such as entry barriers, and then several other relevant factors, such as the vitality and prospects of the merging parties which affect the significance of past market shares.

E. *Entry Barriers To The Organic Pigment Industry Are Substantial, But Entry Remains Unimpeded*

There are no important entry barriers into the organic pigment industry in terms of key raw materials or production technology. (F. 631). However, capital requirements for the construction of production facilities are substantial. (F. 633). Also, the product testing and approval system prevalent in some user-segments of the industry can cause delay in entry. (F. 640). However, my overall assessment of the entry barriers is that they are substantial but moderate,[18] a

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[14] *See* Kaysen and Turner, *Antitrust Policy*, at 30, 72.

[15] *See* IV *Antitrust Law*, ¶ 911f at 65.

[16] *See* IV *Antitrust Law*, ¶ 911a, 911f, 915 at 61, 66–67, 83.

[17] *See* IV *Antitrust Law*, ¶ 910a at 54.

[18] The *Rhinechem* court found that entry barriers were "substantial" in the organic pigment industry. *FTC v. Rhinechem Corp.*, 459 F. Supp. 785, 789–90 (N.D. Ill. 1978).

conclusion supported by the unimpeded entry and continued growth of small firms during the recent years. (F. 642, 699–707).

Complaint counsel argue, however, that except for American Hoechst (about [***] share in 1978), there has been no significant or substantial entry into the market. They would disregard an impressive number of small entrants which are profitable and growing rapidly since their entry. This argument is unpersuasive. The thrust of the claim that entry barriers are low is not that competition will not be lessened substantially because the market has been significantly deconcentrated due to substantial and effective entries, but that the anticompetitive effect will not endure as long as it would if entry barriers were high enough to impede entry effectively. In this case, the fact of unimpeded entry of firms which have established solid market positions, are prosperous and growing, evidences moderate entry barriers.[19] [184]In the final analysis, the condition of entry is a neutral factor in this case: it does not argue either for a lower or higher threshold level of presumptive ban with respect to the BWC-CPD merger.

F. *The Elimination Of Direct Competition Was De Minimis*

The evidence shows that, although the merging firms competed in the organic pigment market, the direct competition between them was *de minimis* for two reasons: (1) BWC was an insignificant factor and (2) they sold largely heterogeneous pigment products. First, although BWC bears the "BASF" name, known as a world leader in industrial chemicals and colorants, it has for years remained a small import operation as far as organic pigments are concerned. With all its "big name" aura, BWC was an insignificant factor with a less-than-2% share.[20] (F. 587, 619–24).

Secondly, the bulk of CPD's organic pigment business was with the printing ink producers and consisted mainly of flushed colors. BWC, however, had no flushed colors to sell. The product overlap between CPD and BWC was limited to dry pigments for all practical purposes. (F. 608–15). *See Coca Cola Bottling Co.,* 93 F.T.C. 110, 205–07 (1979); *Heublein, Inc.,* 96 F.T.C. 385, 580–81 (1980).

G. *The Argument That BWC's Competitive Significance Is Understated By Its Past Market Share*

Complaint counsel's argument that BWC's past market share understates BWC's true competitive potential is equally unpersua-

[19] *See* IV *Antitrust Law,*¶ 917b at 86–89. This is not to say that the organic pigment market is characterized by ease of entry.

[20] *Cf. Tenneco, Inc.,* 3 Trade Reg. Rep. at 22,157–58, n. 62 (1982) (The FTC does not view a foreign firm's dominant position in its domestic market as highly probative of even its potential market share in the United States).

sive. Granted that BWC is not the same as any other importer-seller with a 2% share of the market. It is a part of the world-class chemical giant we know as BASF. In principle, BWC can "draw" upon the vast financial and technological resources of BASF. But, all of that did not help BWC much in the United States market in the past. We have a glimpse of the reasons. Most important, BASF could not provide BWC with flushed colors. There is also evidence that BASF/BWC could not translate European research and technology into products for the United States automotive coatings industry, and [185]that BWC was unable to resolve technical problems quickly. (F. 659). And there were difficulties due to differences in pigments and pigment systems between Europe and the United States. (F. 419–31, 661–63).

Finally, there is no evidence of any new products, new processes, or new production plants under construction or coming on stream, which may be expected to increase BWC's market position significantly in the near future. In these circumstances, it would not be realistic to give much weight to BWC's future competitive "potential" in interpreting the market share evidence. *Cf. Tenneco, supra.*

H. *Imports As A Moderating Factor*

The parties agree that imports make it difficult for the industry firms to control the supply and prices and this is a moderating factor. Complaint counsel argue, however, that imports are controlled by a small number of foreign firms which also sell organic pigments in this country. However, these firms have an incentive to increase imports because their well-being and growth is largely dependent on the success of the import business. In any event, the bulk of imports are specialty pigments and the role imports can be expected to play is limited either way by that fact.

I. *Buyer Concentration Is Generally Low*

The record shows that although many of the users of organic pigments are large firms, buyer concentration is generally low except in the automotive coatings segment. (F. 647). To the extent that there are large buyers who buy in large volumes, that fact may have a moderating influence on prices. In any event, there is nothing in the record to suggest that buyer concentration will significantly affect the inferences to be drawn from market shares in this case.[21]

J. *There Are Other Factors Which Affect The Significance Of The Market Share Evidence*

There are two factors which indicate that the market share

[21] *See* IV *Antitrust Law*,¶ 918 at 89–91.

evidence may overstate the true competitive significance of the [186] merging firms. First, the record clearly shows that CPD's previous owners failed to expend funds necessary to maintain the production facilities adequately and keep them reasonably up to date at the Huntington plant and that, as a result, the Huntington plant had seriously deteriorated. Indeed, the record evidence on this subject illustrates what disinvestment is and what it leads to. (F. 339–83).

Secondly, there is evidence that BWC suffered from significant marketing and technical difficulties selling BASF products to American users of organic pigments. (F. 189–98, 419–31, 662–63). These are obviously factors which affect BWC's future vitality and arguably tend to diminish whatever competitive significance attributable to its small market shares.[22]

K. *The Evidence Shows Vigorous Price Competition*

There is clear evidence of vigorous price competition in the organic pigment market and that smaller firms are especially aggressive price competitors. Although the industry firms publish price lists and register their "American Selling Prices" with the Government for tariff purposes, off-list prices and discounts are known to be common occurrences. This vigorous price competition is consistent with the widely-held view that the organic pigment industry has had significant overcapacity for some years. This view was also reflected in some contemporaneous marketing documents of industry firms. In any event, the record evidence of price competition is clearly at odds with any oligopolistic interdependence or price coordination in the organic pigment market. Indeed, the evidence of strong price competition present in this record is all the more significant in view of the highly user-oriented and service-intensive nature of the product market.

L. *There Is Evidence of Subnormal Profitability In The Organic Pigment Industry*

The record reflects a widely-held perception among industry witnesses that the profits or rates of return in the organic pigment market are low. And, as was the case with price competition, the low profitability of the industry firms appears to be related to "overcapacity." However, smaller firms appear generally prosperous and some are earning enough profits to expand significantly. The [187] evidence is clear that this mature industry has significantly more capacity than is needed to meet the demand with respect to a number of products. Mr. Glassman's view, based on his profitability

[22] *See* IV *Antitrust Law*, ¶ 932 at 131.

study (RX 2131), that the rate of return in this industry is lower than that of other manufacturing industries, is consistent with other evidence in the record.

M. *The Smaller Firms Are Prosperous, Profitable And Growing Rapidly*

Although the organic pigment industry is concentrated, there is clear evidence that many smaller firms are prosperous, profitable and growing rapidly. (F. 699–707). It is true that most of these firms are specialized: their business for the most part is selling flushed pigments to ink producers. Their product lines are limited in that sense and they are not capable of competing with Sun Chemical, for example, across-the-board in every user industry. However, a small specialist can offer as many products to its customers as his diversified competitors can to the same customers. The point is that they do not need to offer a complete line of pigments in order to prosper, to grow and to earn an attractive return in this market. The evidence strongly suggests that the small firms do not believe in "live-and-let-live," and that they are not likely to live a "quiet life" or to acquiesce in controlled output or prices by the larger firms.

N. *The Proponent Of The Acquisition Has Met The Burden Of Rebutting The Presumptive Illegality Based On Aggregate Market Shares*

The presumptive illegality of the BWC-CPD merger is based on a low threshold level of 10% in a partially concentrated market. To begin with, there is authority which would raise the threshold to about 15% in cases where one of the merging firms has a market share of 2% or less. In sum, the presumption of illegality in this case was a relatively weak one.

The record does not contain clear quantitative evidence to establish that the market shares reflecting the "true" competitive significance of the merging firms would fall below the 10% threshold level.[23] However, I am persuaded that the kinds and quantum of evidence relating to the various factors other than seller [188] concentration which bear on competition and the competitive significance of this merger, reviewed and discussed hereinabove are clearly sufficient to overcome the relatively weak presumption of illegality based on a low threshold level of 10% aggregate market share.

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[23] *Cf.* IV *Antitrust Law*,¶ 934 at 132–35.

O. *The Potential Competition Aspect Of The Case*

The record is clear that BASF/BWC was a likely potential entrant/expander in the organic pigment market. (F. 711–27).

Relying on *Heublein, Inc.,* 96 F.T.C. 385, 583 (1980) and the "potential expander" theory enunciated by the Commission in that case, complaint counsel contend that BWC ran afoul of Section 7 by acquiring a "leading firm" in the organic pigment market instead of constructing a production plant in the United States or acquiring a "smaller competitor." However, *Budd Co.,* 86 F.T.C. 518, 580–81 (1975), would appear dispositive of this argument inasmuch as the Commission there unequivocally held that an acquisition of a firm with 10% or less of the market is regarded as a toehold acquisition. The fact that there was an alternative acquisition candidate which was smaller than CPD in terms of market shares does not alter the conclusion that, according to *Budd Co.,* the CPD acquisition was a toehold acquisition.

In any event, one cannot overlook a certain incongruity in a two-sworded merger law enforcement policy which would attack a horizontal merger on the basis of presumptive illegality and, having failed, would condemn it with the sword of potential competition theory especially where, as here, the industry is not highly concentrated.

The record also fails to support complaint counsel's argument that BWC was a perceived potential entrant and that its acquisition entry constitutes an independent Section 7 violation. First, BWC was already in the market. Second, the CPD acquisition was a toehold acquisition according to *Budd.* Third, the evidence complaint counsel rely on to show competitors' perception of BWC as a potential entrant and the benefits accruing therefrom is vague, speculative and mixed. The record is devoid of any clearcut evidence demonstrating that any firm in the United States organic pigment market made a decision regarding prices or output by reason of its recognition of BASF/BWC as a potential entrant wating in the wings about to enter the market.

Finally, any elimination of potential competition by the challenged merger would be insubstantial for there are other potential entrants/expanders similarly situated as BWC. To name a few, Sandoz, Dainippon, Dainichiseika, and Toyo, all world-class chemical firms which sell imported organic intermediate and/or [189]pigment products in this country, are known to have bid for CPD or considered joint ventures in organic pigment production in the United States during the last few years. (F. 575–76, 730).

Conclusions of Law

1. The Federal Trade Commission has jurisdiction over the respondent and the subject matter of this proceeding.

2. Respondent BASF Wyandotte Corporation (BWC) is a Corporation organized under the laws of the State of Michigan, with its principal place of business at 100 Cherry Hill Road, Parsippany, New Jersey.

3. Chemetron Corporation (Chemetron) is a corporation organized under the laws of the State of Delaware, with its principal place of business at 111 E. Wacker Drive, Chicago, Illinois. Chemetron is a wholly-owned subsidiary of Allegheny International (Allegheny), a corporation organized under the laws of the State of Pennsylvania, with its principal place of business at 2700 Two Oliver Plaza, Pittsburgh, Pennsylvania.

4. At all times relevant to this proceeding, BWC has been engaged in the sale of organic pigments in interstate commerce and the assets of BWC and Chemetron have been and are used in interstate commerce, and BWC and Chemetron are engaged in commerce as "commerce" is defined in the Clayton Act, as amended, and the businesses of BWC and Chemetron are in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended.

5. On November 17, 1978, BWC and Allegheny entered into a definitive agreement which provided, *inter alia,* for the acquisition by BWC of the assets of Chemetron Pigments Division of Chemetron Corporation (CPD). On March 23, 1979, BWC acquired the assets, business, and property of CPD.

6. The relevant product market is the organic pigments market.

7. The relevant geographic market is the United States consisting of the 50 states, the Virgin Islands, and Puerto Rico.

8. The organic pigments market is concentrated.

9. There are substantial barriers to entry into the manufacture and sale of organic pigments, but entry of new firms remains unimpeded.

10. Prior to the acquisition, BWC and CPD were and had been for many years actual competitors of each other in the organic pigments market and actual competitors of others in the organic pigments market throughout the United States. **[190]**

11. In 1978, BWC accounted for 1.7% and CPD, 8.9% of the United States organic pigment market.

12. In 1978, BWC accounted for 4.2% and CPD, for 10.3% of the alleged phthalocyanine pigments market.

13. BASF AG, a worldwide leader in the production and sale of organic pigments, was a potential entrant/expander in the organic pigment market in the United States.

14. The acquisition produced a combined market share of more than 10% in the organic pigment market and constitutes a presumptive violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

15. The record contains sufficient evidence to overcome the presumption of illegality in the following ways, among others:

(a) The organic pigment market is characterized by vigorous price competition;

(b) There is evidence of overcapacity which tends to spur price competition and depress profitability;

(c) There is evidence of subnormal profits in the organic pigment industry;

(d) Small firms are growing rapidly and are generally more profitable than large firms;

(e) The direct competition eliminated by the BWC-CPD merger was *de minimis.*

16. The potential competition eliminated by the BWC-CPD merger was *de minimis.*

17. The BWC-CPD acquisition was a toehold acquisition and may be procompetitive.

18. Complaint counsel have failed to establish, by a preponderance of credible evidence, that the acquisition of CPD by BWC is a violation of Section 7 of the Clayton Act or Section 5 of the Federal Trade Commission Act, as alleged in the Complaint.

Accordingly, the following order will be entered. [**191**]

Order

It is ordered, That the Complaint be, and the same hereby is, dismissed.

Final Order

The Administrative Law Judge filed an Initial Decision dismissing the complaint in this matter on May 14, 1982, and service on the parties was completed on May 26, 1982. No appeal from the Initial Decision has been filed. The Commission has determined that the case should not be placed on its own docket for review and that the Initial Decision should become effective as provided in Rule 3.51(a) of the Commission's Rules of Practice (16 C.F.R. 3.51(a)). By operation

of Rule 3.51(a), the Commission adopts the Administrative Law Judge's order of dismissal as its decision in this matter. The precedential significance of all or any part of this dismissal in future Commission proceedings will depend entirely on the persuasive weight the Commission determines that it should bear in such proceedings. Accordingly,

It is ordered, That the Initial Decision dismissing the complaint herein shall become effective on July 13, 1982.

IN THE MATTER OF

NATIONAL DAIRY PRODUCTS CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 2 (a) OF THE CLAYTON ACT

Docket 8548. Final Order, Oct. 2, 1969—Modifying Order, July 27, 1982

This order reopens the proceeding and modifies the Commission's Final Order issued on October 2, 1969 (76 F.T.C. 392), to ease restrictions on pricing for jams, jellies and preserves, so that only those price differences that injure competition would violate the order. The Commission declined Kraft's request to rescind the order or have it expire in 1987.

ORDER MODIFYING FINAL ORDER

Whereas, a "Petition of Kraft, Inc. to Reopen And Modify Cease And Desist Order" was filed on March 10, 1982 by Kraft, Inc. the successor to National Dairy Products Corporation, pursuant to Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. 2.51, wherein Kraft, Inc. seeks to have the order that was issued on October 2, 1969 rescinded or modified;

Whereas, the matter was thereafter placed on the public record for thirty (30) days pursuant to Section 2.51(c) of the Commission's Rules of Practice, 16 C.F.R. 2.51(c), during which time comments from the public were received; and

Whereas, the Commission thereafter considered the petition presented by Kraft, Inc. and all of the information submitted as comments on the petition and has determined that the petition makes a satisfactory showing that changed conditions of fact or law or that the public interest requires that the order be reopened for the purpose of modification.

Accordingly, *It is ordered,* that the matter be reopened and that the order be modified so that it will read:

It is ordered, That respondent Kraft, Inc. a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporate device, in connection with the sale or offering for sale of jam, jelly or preserve products of its Retail Foods Group, in commerce, as "commerce"is defined in the Clayton Act, do forthwith cease and desist from:

Discriminating, directly or indirectly in price between different purchasers of such products of like grade and quality for resale at the same level of distribution where the effect of such discrimination may be substantially to lessen competition or tend to create a

monopoly in the manufacture of jam, jelly or preserve products; *Provided, however,* that it shall be a defense in any enforcement proceeding instituted hereunder for respondent to establish any affirmative defense set forth in Sections 2(a) or 2(b) of the Clayton Act or Section 8 of the Motor Carrier Act of 1980.

It is further ordered, That respondent's request to rescind the order or to have the order expire in 1987 is denied.

IN THE MATTER OF

ASH GROVE CEMENT COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 8785. Order, June 24, 1975—Modifying Order, July 29, 1982

This order reopens the proceeding and modifies the Commission's Order issued of June 24, 1975, (85 F.T.C. 1123) by deleting Paragraph IV from the Order, so as to allow respondent to retain the assets of its divested subsidiary, which it reacquired when the purchaser of the divested plant defaulted on its payments to respondent.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED JUNE 24, 1975

The Federal Trade Commission having considered the June 2, 1982 petition of Ash Grove Cement Company to reopen this matter and to modify the order to cease and desist issued by the Commission on June 24, 1975, and having determined that changed conditions of fact and the public interest warrant reopening and modification of the order,

It is ordered, That this matter be, and it hereby is, reopened and that Paragraph IV of the Commission's order be, and it hereby is, deleted.

IN THE MATTER OF

EXXON CORPORATION, ET AL.

DISMISSAL ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9130. Complaint, Aug. 10, 1979—Dismissal order, July 30, 1982

The Federal Trade Commission has issued an order dismissing the 1979 complaint challenging Exxon's proposed acquisition of Reliance Electric Company, finding that, ". . . the acquisition would not have had competitive effects of the magnitude of those anticipated by the company and the Commission in 1979." The dismissed complaint alleged that the acquisition would eliminate Exxon as an actual potential entrant into the U.S. electronic variable speed industrial drives market.

Appearances

For the Commission: *David W. Long.*

For the respondents: *Robert M. Sayler, Covington & Burling,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have undertaken an acquisition that, if consummated, would result in a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that said undertaking therefore constitutes a violation of Section 5(a)(1) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(a)(1), and having found that a proceeding by it with respect thereof is in the public interest, hereby issues its complaint, charging as follows:

THE RESPONDENTS

1. Respondent Exxon Corporation (hereinafter "Exxon") is a New Jersey corporation with its principal office at 1251 Avenue of the Americas, New York, New York. Respondent Enco, Incorporated ("Enco") is a Delaware corporation with its principal office at the same address. It is a wholly-owned subsidiary of Exxon.

2. Exxon is the largest industrial corporation in the world in assets, and is the second largest in sales. Its principal business is the production, transportation and refining of crude oil, but it is also a

major producer of plastics, petrochemicals and other petroleum-based products. Exxon is also engaged in non-petroleum extractive industries such as copper, coal and uranium, and has been expanding into electronic communication and data handling, semiconductors, solar energy and other technological industries.

3. At all times relevant herein, Exxon sold and shipped its products throughout the United States, and engaged in or affected interstate commerce within the meaning of Section 1 of the Clayton Act, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44. The acquisition described in paragraphs 5 and 6 of this complaint likewise is in or affecting interstate commerce within the meaning of those statutes.

THE ACQUISITION

4. Reliance Electric Company (hereinafter "Reliance") is a Delaware corporation with its principal place of business at 29325 Chagrin Blvd., Cleveland, Ohio. Reliance is a leading manufacturer of electrical equipment and related products, as well as scales and balances, and also has a sizeable telecommunications business. In fiscal year 1978, Reliance had sales of $966.3 million and assets of $613.2 million, ranking it 262nd and 288th, respectively, on the Fortune 500 lists of American industrial corporations. Reliance's sales for fiscal year 1979, which ends in October 1979, are presently running at an annual rate of $1.5 billion.

5. On May 25, 1979, Exxon announced its intent to initiate a cash tender offer for the purchase of any and all outstanding shares of the common stock of Reliance for $72 per share and any and all outstanding shares of Reliance's Series A preferred stock for $201.60 per share. On the basis of the shares outstanding as of January 31, 1979, the total value of the offer would be $1.17 billion. The pre-announcement price of Reliance common stock was $36.50 per share.

6. The tender offer was formally opened on June 28, 1979, by Enco. On July 11, 1979, the initial termination date of the offer, Exxon announced that the offer would be extended to July 13, 1979. On July 13, Exxon announced that over 95 percent of Reliance's common stock had been tendered.

7. On July 27, 1979, the Commission directed its attorneys to seek a preliminary injunction against consummation of the acquisition. On July 28, 1979, the United States District Court for the District of Columbia entered a temporary restraining order enjoining consummation of the acquisition pending a hearing and decision on the Commission's application for a preliminary injunction. By

order dated August 6, 1979, the district court extended the temporary restraining order until August 17, 1979.

TRADE AND COMMERCE

8. Electronic variable speed industrial drives ("EVSD") constitute a competitively significant line of commerce, or market.

9. A competitively significant geographic area in which EVSD are marketed is the United States.

10. The EVSD market is concentrated, with the four leading producers in 1977 having in excess of 55% of all sales.

11. Barriers to broad-product-line entry into the EVSD market are high.

12. Reliance is a leading producer of EVSD.

13. Exxon possesses technology that it claims would permit it to manufacture EVSD that are superior in operating characteristics and lower in cost than other EVSD currently available. Exxon has built at least two prototype or demonstration EVSD which have been installed and are operating in Exxon's refineries.

14. But for the acquisition of Reliance, in order to reap the commercial benefits of its technology, Exxon would enter the EVSD market either *de novo* or through the acquisition of a toehold company, *i.e.*, a company with a relatively small share of the EVSD market.

EFFECTS OF THE ACQUISITION

15. Exxon's acquisition of Reliance would eliminate Exxon as an actual potential entrant into the United States EVSD market, thereby eliminating the likelihood that entry by Exxon would:

(a) decrease concentration in the market;
(b) increase competition in the market; or
(c) increase competition in the development of EVSD technology and products.

16. Exxon's acquisition of Reliance would likely have anticompetitive effects in the United States EVSD market, including but not limited to:

(a) increasing the level of concentration in the market;
(b) elevating barriers to entry into the market; or
(c) eliminating competition in the development of EVSD technology and products.

VIOLATIONS CHARGED

17. The effect of the acquisition of Reliance by Exxon may be substantially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

18. Acquisition of Reliance by Exxon and Enco would constitute an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

19. By undertaking the acquisition that would give rise to the violations described in paragraphs 17. and 18., Exxon and Enco have violated Section 5(a)(1) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(a)(1).

Order Dismissing Complaint

On August 10, 1979, the Commission issued an administrative complaint against respondents challenging the intended acquisition of Reliance Electric Company by Exxon Corporation, through its subsidiary Enco, Incorporated. The complaint alleged that the acquisition, which was subsequently consummated pursuant to a hold-separate order[1], would eliminate Exxon as an actual potential entrant into the United States electronic variable speed industrial drives ("EVSD") market, thereby eliminating the likelihood that entry by Exxon would: (a) decrease concentration in the market; (b) increase competition in the market; or (c) increase competition in the development of EVSD technology and products. The factual premise of the complaint was that Exxon had made a breakthrough in EVSD technology and, but for the acquisition of Reliance, would enter the market either *de novo* or through the acquisition of a toehold company.

After substantial pretrial discovery, complaint counsel moved on May 14, 1982, for a dismissal of the complaint. The motion was certified to the Commission by the ALJ without a recommendation on May 17, 1982. Respondents did not file an answer.

In their motion and accompanying papers[2] complaint counsel have explained in detail how recent discovery has shown that Exxon, and consequently the Commission, misjudged the commercial viability of its new technology, called "alternating current synthesis" ("ACS").

[1] A temporary restraining order was issued on July 28, 1979 by United States District Judge Harold H. Greene. On August 17, 1979, District Judge John H. Pratt entered the hold-separate order. That order was modified on October 26, 1979, to exclude Reliance's "motors unit" from the hold-separate requirement and also on June 25, 1980. Certain aspects of the June 25 modification not relevant here were struck down by the Court of Appeals in December, 1980. *FTC v. Exxon Corp.*, 636 F.2d 1336 (D.C. Cir. 1980).

[2] The motion to dismiss and Attachments A-M were filed on the public record. Complaint counsel also filed *in camera* a lengthy memorandum in support and 68 attachments, consisting of internal Exxon documents and investigational transcripts.

Thus, rather than marketing ACS for Exxon, as Exxon had hoped, Reliance guided the company to the realization that ACS was not the breakthrough it had been thought to be and that, moreover, the prospects even for modest commercial exploitation were questionable: ACS suffered from serious reliability and serviceability problems, and its production costs were vastly greater than originally estimated. Consequently, on March 20, 1981, Exxon announced that it had abandoned its efforts to develop the ACS design. While Reliance's "ACS Group" (the unit not subject to the court's hold-separate order) explored the possibility of another technology, that effort was terminated in August, 1981.

In light of these newly discovered facts, it is now apparent that Exxon never was the significant potential entrant that it was alleged to be in the Commission's complaint. Even if Exxon had attempted to enter the EVSD market by alternative means,[3] the Commission has no reason to believe that such entry, without a new technology, would have offered "a substantial likelihood of ultimately producing deconcentration of that market or other significant procompetitive effects."[4] In any event, it now appears that the acquisition would not have had competitive effects of the magnitude of those anticipated by the company and the Commission in 1979.

The complaint is hereby dismissed.

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[3] Absent the Reliance acquisition, Exxon might have acquired a toehold company or continued internal development of the ACS technology. However, in either case, it would have learned eventually of the failings of ACS. This probably would have ended Exxon's interest in the EVSD market, since the company seems to have been interested in entering that market *only* as a technological innovator.

[4] *United States v. Marine Bancorporation*, 418 U.S. 602, 633 (1974).

IN THE MATTER OF

NATIONAL ASSOCIATION OF SCUBA DIVING SCHOOLS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3094. Complaint, July 30, 1982—Decision, July 30, 1982

This consent order requires a Long Beach, Ca. corporation in connection with the issuance or authorization of various seals of approval, among other things, to cease representing that any diving equipment or product bearing their seal or insignia meets an objective standard of safety or reliability unless such equipment has been competently and credibly tested. The order bars any misrepresentations concerning the significance of any seal or insignia and requires respondent to provide those who utilize the seals with a copy of the order and a letter explaining its provisions; discontinue doing business with any user of such seals who does not comply with the order's provisions; and institute a program of reasonable surveillance to ensure compliance with the order.

Appearances

For the commission: *Dean Hansell* and *Kenneth H. Donney.*

For the respondent: *John Gaffney,* in-house counsel, Long Beach, Ca. and *Richard A. Lesser,* Hermosa Beach, Ca.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by that Act, the Federal Trade Commission, having reason to believe that the National Association of Scuba Diving Schools, Inc., ("NASDS"), a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issue its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent NASDS is a corporation, organized, existing and doing business under and by virtue of the laws of the State of California, having its principal office and place of business at 641 West Willow Street, Long Beach, California.

PAR. 2. Respondent NASDS is a marketing and management organization, serving over 200 retail diving stores nationally. It is now and for some time last past has been engaged in the develop-

ment, offering for sale and sale of marketing and promotional devices, services, and programs for scuba diving and skin diving retail stores and equipment.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of paragraphs one and two are incorporated by reference herein as if fully set forth verbatim.

PAR. 3. In the ordinary course and conduct of its business, respondent serves retail diving stores located in 40 states and the District of Columbia. It causes and has caused the conduct of business in each of these states and the District of Columbia through the U.S. mail and other facilities of interstate commerce. Respondent maintains and has maintained a substantial course of business, including the acts and practices hereinafter set forth, that is in or affects commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of its business, respondent has developed, offers for sale and sells to retail diving stores a seal of approval that respondent refers to as its "Seal of Excellence" and its "Seal of Acceptance". Respondent uses its seal of approval as a promotional device. The seal is elliptical in shape and in addition to bearing the name "National Association of Scuba Diving Schools" displays prominently the terms "INTEGRITY", "SAFETY", "INSTRUCTION", "SPORT", "SEAL OF ACCEPTANCE" and "SEAL OF EXCELLENCE". A copy of the seal is attached to this complaint.

PAR. 5. In the ordinary course and conduct of its business, respondent publishes a magazine, *The Diving Retailer & Professional Instructor,* which is distributed to members of the diving industry including those retail diving stores which respondent serves. In many issues of the publication respondent advertises a copy of its seal of approval as follows:

THE
PRODUCTS
PRODUCT
BACKERS
BACK.

Our customers look for this seal before they buy. It's their guarantee of quality.

The NASDS Seal of Excellence is an opportunity for our individual member stores to high-light their best values in equipment systems components.

All our stores service what they sell. And when you service what you sell you learn what equipment holds up and is the best value for the money.

Only our stores stand behind their products in this way. We know our success depends on satisfied customers.

PAR. 6. In the ordinary course and conduct of its business, respondent prepares diving product advertisements that promote the seal. The advertisements depict a diving product to which the seal is attached or affixed. The advertisement copy describes the product in favorable terms and states that because of these features the product has earned the NASDS seal. The advertisements are placed in publications disseminated to the diving industry and to the general public. Respondent disseminates these advertisements, directly or indirectly, to consumers.

PAR. 7. In the ordinary course and conduct of its business, respondent offers for sale or sells sets of display signs to retail diving stores that identify departments within the store. These signs prominently feature the seal and urger consumers to look for the seal before they buy diving equipment. These signs are placed in retail diving stores where they are read by consumers. Respondent disseminates these signs, directly or indirectly, to consumers.

PAR. 8. Respondent sells price tags and decals bearing its seal of approval to retail diving stores. There price tags and decals are sold for the purpose of being and are, in fact, attached or affixed by the stores to scuba and skin diving products offered for sale to consumers.

PAR. 9. Respondent, in promoting the seal in the aforesaid manner, represents directly or by implication to consumers that the seal is attached or affixed to or used in conjunction with scuba and skin diving products only if these products have been approved by respondent either because the products had been tested or certified by respondent for safety, integrity, or excellence, or because they have met some other objective standards of performance, reliability or quality set by respondent.

PAR. 10. In truth and in fact:

a. the seal may be attached or affixed to, or used in conjunction with, products without regard to whether these products have been approved by respondent either because the products have been tested or certified for safety, integrity, or excellence by respondent, or have met some other objective standards of performance, reliability or quality set by respondent; and

b. respondent has not conducted, sponsored, commissioned or relied upon testing or certification for safety, integrity or excellence of products to which the seal has been attached, affixed or used in conjunction with; and

c. respondent has not set objective standards of performance, reliability or quality for products to which the seal has been attached, affixed or used in conjunction with.

Therefore, the aforesaid statements, representations, acts or practices by respondent are false, misleading, deceptive or unfair.

PAR. 11. The use by respondent of the aforesaid false, misleading, deceptive, or unfair statements, representations, acts or practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements, representations, acts or practices are true and into the purchase of substantial quantities of diving equipment to which the seal has been attached, affixed or used in conjunction with by reason of said erroneous and mistaken belief.

PAR. 12. The acts and practices of respondent NASDS, as herein alleged, were and are all to the prejudice and injury of the public and constituted and now constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

COUNT II

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Eight, inclusive, are incorporated by reference herein as if fully set forth verbatim.

PAR. 13. As a result of the acts and practices alleged in Paragraphs Four through Eight, respondent allows, authorizes, or encourages other persons, corporations, partnerships or other entities (hereinafter "users") to attach or affix its seal of approval to scuba and skin diving products as a promotional device in the selling of such products to the public.

PAR. 14. Respondent, by authorizing or encouraging users to attach or affix or use its seal in conjunction with scuba and skin diving products as a promotional device in the selling of such products, represents directly or by implication to consumers that the seal is attached or affixed to or used in conjunction with said products only if these products have been approved by respondent either because the products have been tested or certified by respondent for safety, integrity or excellence, or because they have met some other objective standards of performance, reliability or quality set by respondent.

PAR. 15. In truth and in fact:

a. respondent authorizes or encourages users to attach or affix the seal or use it in conjunction with scuba and skin diving products, without regard to whether these products have been approved by respondent either because the products have been so tested or certified by respondent for safety, integrity or excellence or have met some other objective standards of performance, reliability or quality set by respondent;

b. respondent has not conducted, sponsored, commissioned or relied upon testing or certification for safety, integrity or excellence of products to which the seal has been attached, affixed or used in conjunction with; and

c. respondent has not set objective standards of performance, reliability or quality for products to which the seal has been attached, affixed or used in conjunction with.

Therefore, the aforesaid statements, representations, acts or practices are false, misleading, deceptive or unfair.

PAR. 16. Respondent, by allowing users to attach or affix the seal of approval to scuba and skin diving products, places in the hands of such users of the seal an instrumentality whereby such users are enabled to and do represent, directly or by implication, that the products to which the seal is attached or affixed have been approved by NASDS either because the products have been tested or certified by respondent for safety, integrity, or excellence or because they have met some other objective standards of quality, reliability or performance set by respondent, without regard to whether such products have been so tested or certified or have met such standards.

Therefore, the aforesaid statements, representations acts or practices by respondent are false, misleading, deceptive or unfair.

PAR. 17. The use by respondent of the aforesaid false, misleading, deceptive, or unfair statments, representations, acts or practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements, representations, acts or practices are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 18. The acts and practices of respondent NASDS, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

SEAL OF ACCEPTANCE
SEAL OF
INSTRUCTION
SAFETY
SPORT
National Association of SCUBA DIVING SCHOOLS
INTEGRITY
EXCELLENCE

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

the Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further confirmity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent is a corporation organized, existing and doing business under and by virture of the laws of the State of California, with its office and principal place of business located at 641 West Willow Street, in the City of Long Beach, State of California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

It is ordered, That respondent National Association of Scuba Diving Schools, Inc., ("NASDS"), a corporation, and its successors and assigns, and respondent's officers, agents, representatives, and employees, jointly or severally, directly or through any corporation, subsidiary, division, or other device, in connection with the issuance or authorization of various seals of approval, emblems, shields, or other insignia in or affecting commerce, as "commerce" is defined in

the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any such seal, emblem, shield, or other insignia, is attached to or affixed to or used in conjunction with any scuba diving or skin diving product, or any other product, as an assurance that such product meets an objective standard of safety or reliability or any other objective standard of quality or performance, unless such product has been competently, adequately and thoroughly tested in such a manner as reasonably to substantiate with competent and reliable evidence any such assurance and unless any connection between the tester and the product that might materially affect the weight and the credibility of the test and that is not reasonably expected by the public, such as the tester being the product's manufacturer, is fully disclosed on the seal.

2. Using or encouraging, authorizing, or allowing anyone else to use any such seal, emblem, shield, or other insignia that represents, directly or by implication, that any scuba diving or skin diving product or any other product meets an objective standard of safety or reliability or any other objective standard of quality or performance, unless such product has been competently, adequately and thoroughly tested in such a manner as reasonably to substantiate with competent and reliable evidence any such representation and unless any connection between the tester and the product that might materially affect the weight and the credibility of the test and that is not reasonably expected by the public, such as the tester being the product's manufacturer, is fully disclosed on the seal.

3. Misrepresenting, directly or by implication, the significance of any such seal, emblem, shield or other insignia.

II.

It is further ordered, That respondent shall provide all present and future persons, corporations, partnerships, or other entities who use any insignia of respondent with a copy of this Order and a letter informing such users that they can no longer use the respondent's insignia except in a manner consistent with the provisions of this Order. Respondent shall immediately stop doing business with any user of its insignia if that user acts in a manner inconsistent with the provision of this Order; and respondent shall institute a program of reasonable surveillance of all users in order to assure their compliance with this Order.

III.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution, subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the Order.

IV.

It is further ordered, That respondent shall within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which respondent has complied with this Order.

IN THE MATTER OF

AMERICAN DENTAL ASSOCIATION

MODIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9093. Decision and Order, Sept. 6, 1979—Modifying Order, Aug. 3, 1982

The Federal Trade Commission has modified its Decision and Order issued against the American Dental Association (ADA) on September 6, 1979 (94 F.T.C. 403), pursuant to Paragraph I(A) of the order, which provides that upon entry of a final adjudicated order granting relief against the American Medical Association (AMA), the Commission will reissue its order against the ADA, so that the prohibitions dealing with restrictions on advertising conform to those entered against the AMA.

MODIFICATION OF DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional allegations set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, and in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, having entered an order in Docket No. 9093, the Commission now, in accordance with Paragraph I of the order in Docket No. 9093, hereby makes the following jurisdictional findings and enters the following order:

1. Respondent American Dental Association ("ADA") is an Illinois corporation, with its principal place of business at 211 East Chicago Avenue, Chicago, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

Definitions

For purposes of this Order, the following definitions shall apply:

Respondent: means the American Dental Association ("ADA") and its councils, departments, committees, divisions, subdivisions, trustees, officers, delegates, representatives, agents, employees, successors, and assigns.

Constituent societies means those dental societies or dental associations defined as constituent societies in the January 1, 1978, edition of the American Dental Association's *Constitution and Bylaws* and, in the event that the American Dental Association's *Constitution and Bylaws* is amended to denominate constituent societies differently or to describe a new category of dental societies which replace or are roughly equivalent to constituent societies, *constituent societies* means those dental societies as well.

Component societies means those dental societies or dental associations defined as component societies in the January 1, 1978, edition of the American Dental Association's *Constitution and Bylaws* and, in the event that the American Dental Association's *Constitution and Bylaws* is amended to denominate component societies differently or to describe a new category of dental societies which replace or are roughly equivalent to compenent societies, *component societies* means those dental societies as well.

I.

It is ordered, That respondent American Dental Association directly or indirectly, or through any corporate or other device, in or in connection with respondent's activities as a professional association in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Restricting, regulating, impeding, declaring unethical, interfering with, or advising against the advertising or publishing by any person of the prices, terms or conditions of sale of dentists' services, or of information about dentists' services, facilities or equipment which are offered for sale or made available by dentists or by any organization with which dentists are affiliated;

B. Restricting, regulating, impeding, declaring unethical, interfering with, or advising against the solicitation, through advertising or by any other means, including but not limited to bidding practices, of patients, patronage, or contracts to supply dentists' services, by any dentist or by any organization with which dentists are affiliated; and

C. Inducing, urging, encouraging, or assisting any dentist or any dental association, group of dentists, hospital, insurance carrier or any other non-governmental organization to take any of the actions prohibited by this Part.

Nothing contained in this Part shall prohibit respondent from formulating, adopting, disseminating to its constituent and component dental organizations and to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations, including unsubstantiated representations, that respondent reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or with respect to uninvited, in-person solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence.

II.

It is further ordered, That respondent American Dental Association cease and desist from taking any formal action against a person alleged to have violated any ethical standard promulgated in conformity with this Order without first providing such person with:

A. Reasonable written notice of the allegations against him or her;

B. A hearing wherein such person or a person retained by him or her may seek to rebut such allegations; and

C. The written findings or conclusions of respondents with respect to such allegations.

III.

It is further ordered, That respondent American Dental Association:

A. Send by first class mail a copy of a letter in the form shown in Appendix A to this Order to each of its present members and to each constituent and component organization of respondent, within sixty (60) days after this Order becomes final.

B. For a period of ten years, provide each new member of respondent and each constituent and component organization of respondent with a copy of this Order at the time the member is accepted into membership.

C. Within ninety (90) days after this Order becomes final, remove from respondent American Dental Association's *Principles of Ethics,* and *Official Advisory Opinions,* and from the constitution, bylaws, codes, standards of dentist conduct, and any other existing policy statements or guidelines of respondent, any provision, interpretation or policy statement which is inconsistent with the provisions of Part I of this Order and, within one hundred and twenty (120) days after this Order becomes final, publish in the *Journal of the American Dental Association* and in *ADA News* the revised versions of such documents, statements, or guidelines.

D. Require as a condition of affiliation with respondent that any constituent or component organization agree by action taken by the constituent or component organization's governing body to adhere to the provisions of Parts I and II of this Order.

E. Terminate for a period of one year its affiliation with any constituent or component organization within one hundred and twenty (120) days after learning or having reason to believe that said constituent or component organization has engaged, after the date this Order becomes final, in any act or practice that if committed by respondent would be prohibited by Part I or II of this Order.

IV.

It is further ordered That respondent American Dental Association:

A. Within sixty (60) days after the Order becomes final, publish a copy of this Order with such prominence as feature articles are regularly published in the *Journal of the American Dental Association* and in *ADA News* or in any respective successor publications.

B. Within one hundred and twenty (120) days after this Order becomes final, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which it has complied with this Order.

C. For a period of five (5) years after this Order becomes final, maintain and make available to the Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Part I of this Order, including but not limited to any advice or

interpretations rendered with respect to advertising or solicitation involving any of its members.

D. Within one year after this Order becomes final, and annually thereafter, for a period of five (5) years, file a written report with the Federal Trade Commission setting forth in detail any action taken in connection with the activities covered by Part I of this Order, including but not limited to any advice or interpretations rendered with respect to advertising or solicitation involving any of its members.

V.

It is further ordered That respondent American Dental Association shall notify the Commission at least thirty (30) days prior to any proposed change in the respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or association, or any other change in the corporation or association which may affect compliance obligations arising out of this Order.

Appendix A

[ADA Regular Letterhead]

Dear Doctor:

As you are probably aware, in January of 1977, the Federal Trade Commission issued a complaint against the ADA, the Indiana Dental Association, the Indianapolis District Dental Society, the Virginia Dental Association, and the Northern Virginia Dental Society. The administrative complaint alleged that certain portions of ADA's Principles of Ethics and advisory opinions regarding advertising and solicitation by dentists were in violation of the Federal Trade Commission Act.

We entered into a consent order with the FTC, without admitting any violation of the law, which provided that we and the FTC would be bound by the final outcome of a similar FTC case (Docket No. 9064) principally as it relates to FTC jurisdiction, ethical restrictions on advertising and solicitation, and relief. That case has been ultimately decided and, as agreed in our consent order, the FTC has issued a final order against ADA based upon the final order in FTC Docket No. 9064. The final order is printed in the [insert issue date] issue of the *Journal of the American Dental Association,* the [insert issue date] issue of *ADA News* and may be obtained from the ADA headquarters or from your state or local dental society.

Among other things, the order forbids any action by ADA that would restrict its members' solicitation of patients by advertising or other means. However, the order does not prohibit the ADA from formulating and enforcing reasonable ethical guidelines governing deceptive advertising and solicitation (including unsubstantiated representations). The ADA may also issue guidelines concerning uninvited, in-person solicitation of patients who, because of their particular circumstances, are vulnerable to undue influence.

Because in Docket No. 9064 the Commission decided in its discretion not to apply the order to local societies, the Commission has also omitted local societies from the final ADA order. However, the order requires ADA to sever all ties for one year with

any state or local dental society that engages in conduct of the type prohibited under the order, as well as requiring ADA to amend the *ADA Principles of Ethics* and the *ADA Official Advisory Opinions.*

Thank you for your cooperation.

Sincerely

/s/ _____

IN THE MATTER OF

HAMMERMILL PAPER COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2513. Final Order, April 24, 1974.—Modifying Order, Aug. 6, 1982

This order reopens the proceeding and modifies the Commission's order issued on April 24, 1974 (83 F.T.C. 1587), by modifying subparagraph 1(a) so as to allow the company to impose conditions on the kind of customers its distributors can serve, so long as such conditions do not unreasonably restrain competition.

ORDER MODIFYING DECISION AND ORDER

Whereas, a "Request To Reopen And Modify Consent Order" was filed by Respondent on April 8, 1982 pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 C.F.R. 2.51, wherein Hammermill Paper Company seeks modification of the order that issued on April 24, 1974 to allow Hammermill to impose reasonable nonprice vertical restrictions; and

Whereas, the matter was thereafter placed on the public record pursuant to Section 2.51(c) of the Commission's Rules of Practice, 16 C.F.R. 2.51(c) during which time comments from the public were received; and

Whereas, the Commission thereafter considered the Petition presented by Hammermill Paper Company and all of the materials and information submitted as public comments on the petition and has determined that the request makes a satisfactory showing that changed conditions of fact and law and the public interest require that the order be reopened for the purpose of modification.

Accordingly, *It is ordered,* that the matter is reopened and that subparagraph 1(a) be modified to read:

Limiting, allocating or restricting the persons or classes of persons to whom any dealer or distributor may resell his products, where such limitation, allocation or restriction unreasonably restrains competition.

IN THE MATTER OF

XEROX CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8909. Consent Order, July 29, 1975—Modifying Order, Sept. 10, 1982

This order reopens the proceeding and modifies Paragraph XVII of the Commission's order issued on July 29, 1975 (86 F.T.C. 364) by revising the annual notice that Xerox must print in the Official Gazette of the United States Patent and Trademark Office. The modification eliminates the requirement for repetitious annual printing of domestic and foreign copier patents available for licensing, and requires that only new patents and deletion of expired patents be published.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED JULY 29, 1975

The Federal Trade Commission having considered respondent Xerox Corporation's petition filed on July 11, 1982, to reopen this matter and to modify the consent order to cease and desist issued by the Commission on July 29, 1975, and having determined that reopening and modification of the order is warranted:

It is ordered, That this matter be, and it hereby is reopened and that Paragraph XVII of the Commission's order be and it is hereby modified to read as follows:

XVII

It is further ordered, That annually, until the expiration of all *Future Patents, Xerox* shall submit for publication in the Official Gazette of the United States Patent and Trademark Office a notice

(1) identifying by number, title, date of issue and category of subject matter (to an extent acceptable to the Commission) all United States *patents* which it is empowered to license, together with all *foreign patents* based on the patent application from which each United States *patent* originates, issued since the publication of the last such notice;

(2) stating that *Xerox* shall grant licenses under (a) its *order patents* to make, have made, use and vend *office copier products* under the terms of this order, and (b) patents required to be licensed pursuant to the terms of Paragraph X of this order, if any;

(3) stating that (a) a copy of this order, (b) a list of patents licensed to *Xerox* which are subject to the provisions of Paragraph II and IV (C)(9) of this order, if any, and (c) a list of all patents subject to

this order which have been previously published are available from *Xerox* upon written request; and

(4) citing the issues of the Official Gazette since 1981 in which previous notices have been published. Until the expiration of all *Xerox future patents, Xerox* shall send a copy of this order and a complete list of patents subject to this order to each person who inquires as to the availability of a license for *office copier products,* or to whom *Xerox* has offered such a license at any time since January 1, 1970.

IN THE MATTER OF

LITTON INDUSTRIES, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISION ACT

Docket 9123. Final Order, Jan. 5, 1981—Modifying Order, Sept. 10, 1982

The Federal Trade Commission, in accordance with the decision and judgment of the Ninth Circuit Court of Appeals, has deleted references to "test" data from its order issued on January 5, 1981 (97 F.T.C. 1). Among other things, the modified order prohibits respondent from misrepresenting survey results in its advertising of microwave ovens and other consumer products.

MODIFIED ORDER TO CEASE AND DESIST

Respondents having filed in the United States Court of Appeals for the Ninth Circuit a petition for review of the Commission's order issued herein on January 5, 1981; and the Court having on May 3, 1982, rendered its decision modifying the Commission's order and, as so modified, affirming and enforcing the order; and the time for filing a petition for certiorari having expired and no petition having been filed:

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the decision and judgment of the Court of Appeals to read:

ORDER

I

It is ordered, That respondents Litton Industries, Inc., a corporation, Litton Systems, Inc., a corporation, and their successors, assigns, officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising for sale, sale, or distribution of microwave ovens (either for commercial or consumer use), in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do cease and desist from:

1. Representing, directly or by implication, that any commercial microwave oven or consumer microwave oven

(a) is able to perform in any respect, or has any characteristic, feature, attribute, or benefit; or

(b) is superior in any respect to any or all competing products; or

(c) is recommended, used, chosen, or otherwise preferred in any respect more often than any or all competing products,

unless and only to the extent that respondents possess and rely upon a reasonable basis for such representation at the time of its initial and each subsequent dissemination. Such reasonable basis shall consist of competent and reliable surveys and/or other competent and reliable evidence which substantiates the representation. A competent and reliable survey means one in which persons qualified to do so conduct the survey and evaluate its results in an objective manner, using procedures that insure accurate and reliable results.

2. Failing to maintain accurate records

(a) of all materials that were relied upon in disseminating any representation covered by paragraph I(1) of this order, insofar as the text of such representation is prepared, authorized, or approved by any person who is an officer or employee of respondents, or of any division, subdivision or subsidiary of respondents, or by any advertising agency engaged for such purposes by respondents, or by any of its divisions or subsidiaries;

(b) of all studies, surveys, or demonstrations that contradict any representation made by respondents that is covered by paragraph I(1) of this order.

Such records shall be retained by respondents for three years from the date that the representations to which they pertain are last disseminated, and may be inspected by the staff of the Commission upon reasonable notice.

II

It is further ordered, That respondents Litton Industries, Inc., a corporation, Litton Systems, Inc., a corporation, and their successors, assigns, officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising for sale, sale, or distribution of microwave ovens (either for commercial or consumer use) and any other product normally sold to members of the general public for their personal or household use in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do cease and desist from:

1. Misrepresenting in any manner, directly or by implication, the purpose, sample, content, reliability, results or conclusions of any survey.

2. Advertising the results of a survey unless the respondents in such survey are a census or a representative sample of the population referred to in the advertisement, directly or by implication. A representative sample need not be a probability sample so long as when the ad is first disseminated respondents have a reasonable basis to expect the sampling method used would not produce biased results.

3. Representing, directly or by implication, that experts were surveyed, unless reasonable care was taken to insure that the survey respondents possessed sufficient expertise to qualify as respondents for the survey and to answer the survey questions. For the purposes of this order, an "expert" is an individual, group or institution held out as possessing, as a result of experience, study or training, knowledge of a particular subject, which knowledge is superior to that generally acquired by ordinary individuals.

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with this order.

It is further ordered, That the respondents shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That the respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

Commissioner Bailey did not participate.

IN THE MATTER OF

GODFREY COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3066. Final Order, May 14, 1981—Modifying Order, Sept. 28, 1982

This order reopens the proceeding and modifies the Commission's order issued on May 14, 1981 (97 F.T.C. 456) by modifying Paragraph I(G) of the order to relieve respondent from the obligation of divesting a specified retail grocery store.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED MAY 14, 1981

The Federal Trade Commission having considered respondent Godfrey Company's petition filed on July 8, 1982, to reopen this matter and to modify the consent order to cease and desist issued by the Commission on May 14, 1981, and having determined that reopening and modification of the order is warranted:

It is ordered That this matter be, and it hereby is reopened and that Paragraph I(G) of the Commission's order be and it is hereby modified to read as follows:

(G) The "disposition stores" means the following Godfrey ("G") stores and Jewel ("J") stores:

1. G–427 (3045 S. 13th St., Milwaukee, WI.);
2. G–810 (3939 S. 76th St., Milwaukee, WI.);
3. J–1201 (1201 N. 35th St., Milwaukee, WI.); and
4. J–729 (729 S. Layton Blvd., Milwaukee, WI.).

In the Matter of

THOMAS L. BAKER, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3095. Complaint, Sept. 28, 1982—Decision, Sept. 28, 1982

This consent order requires two San Diego, Calif. corporations to cease, among other things, misrepresenting or failing to disclose material facts regarding the purchase of gemstones as investments, or their liquidity. The respondents are prohibited from misrepresenting the source of graphs or charts used in promotional literature; failing to disclose the limitations associated with the certificates issued by the firms to accompany their gemstones; or representing that their price increases reflect general market increases. Respondents are required to disclose both orally and in writing, before the execution of any contract for the sale of gemstones, among other things, that gemstones are not as easy to sell as other investments; that there are risks involved in the purchase of colored gemstones; and that diamonds .04 to .60 carats may be difficult to resell. Further, respondents are required to comply with the FTC's Mail Order Merchandise Rule and ensure that all personnel receive a synopsis of the order. Additionally, American Diamond Company is exempted from making these disclosures only when the gemstones are sold as jewelry, but must disclose in writing on the sales agreement that jewelry is not sold for investment purposes.

Appearances

For the Commission: *Curtis Yee, David C. Fix* and *Robert D. Friedman.*

For the respondents: *Jeffrey L. Davidson, Davidson, Holmes and Anderson,* Los Angeles, Calif.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Diamond Company, a corporation, Thomas L. Baker, Inc., a corporation also trading and doing business as American Diamond Company, and Thomas L. Baker, individually and as an officer of said corporations, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Thomas L. Baker, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

Respondent American Diamond Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California.

Both of the corporate respondents have their principal offices and places of business at 1205 Prospect St., Room 250, La Jolla, California.

Respondent Thomas L. Baker is an officer and director of each of the corporate respondents named herein. He formulates, directs and controls the acts and practices of said corporate respondents, including the acts and practices hereinafter set forth. His address is the same as that of said corporations.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for sometime have been, engaged in the purchasing, offering for sale, sale, and distribution of gemstones to the consumer public.

PAR. 3. Respondents maintain, and have maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, respondents disseminate and have disseminated promotional materials through the United States mail and have made oral sales presentations by means of telephone calls.

PAR. 5. By and through the means described in Paragraph Four, respondents have made various statements and representations with respect to the liquidity of gemstones purchased as an investment. Typical and illustrative of these statements and representations, but not all inclusive thereof, are the following:

A. Your money is now in an investment which . . . is highly liquid, can be sold virtually at will and because of international demand can be redeemed in the currency of your choice.

B. Rubies can be redeemed in the currency of your choice virtually at will.

C. Diamonds have always been accepted like cash, and you can exchange them in virtually any country in the world for the currency of your choice. Through the American Diamond Company you can buy and sell diamonds via telephone as easily as you can purchase stocks and bonds through your broker.

D. There are 14 international cash markets where one can liquidate a diamond.

E. These "liquidity diamonds," so called because of their high level of negotiabili-

ty, had long been the "currency" of the diamond world—bought, sold, and used as a medium of exchange for centuries by people of all nations.

PAR. 6. Through the use of the aforesaid statements and representations, and others of similar import and meaning, but not specifically set out herein, respondents have represented and are representing, directly or by implication, that:

A. Diamonds and rubies are highly liquid investments which can be easily or quickly sold by an individual investor for a price comparable to what an individual investor would have to pay to purchase such gemstones from respondents or another commercial source.

B. A person can sell diamonds and rubies through respondents as easily as they can sell stocks and bonds through a stock broker.

C. There are numerous outlets available to an individual investor to sell his or her gemstones.

D. There are at anytime established, generally recognized prices for diamonds and other gemstones at which an individual can easily sell or exchange his or her gemstones.

PAR. 7. In truth and in fact:

A. Diamonds and rubies are not highly liquid investments and usually cannot be easily or quickly sold by the individual investor for a price comparable to what the individual investor would have to pay to purchase such gemstones from respondents or another commercial source. In most instances, an individual who wants to sell diamonds or rubies quickly will only be able to effect a sale at a price substantially lower than the price an individual would have to pay to purchase such gemstones from respondents or another commercial source.

B. A person cannot sell diamonds and rubies through respondents as easily as they can sell stocks and bonds through a stock broker.

C. There are only a small number of outlets available to an individual investor to sell his or her gemstones.

D. There are no established and generally recognized prices for diamonds and other gemstones at which an individual can easily sell or exchange his or her gemstones. There is no organized market where prices are established and reported. Prices are established by individual sellers, generally after evaluation and negotiation.

Therefore, the representations set forth in Paragraph Five and

others of similar import and meaning, are false, misleading, and deceptive.

PAR. 8. In making the representations regarding liquidity set forth in Paragraph Five, and others of similar import and meaning, respondents have failed to disclose the material fact that an individual who seeks a quick sale of gemstones will in most instances only be able to obtain a sale at a price substantially lower than the price an individual would have to pay to purchase such gemstones from respondents or another commercial source.

The failure to disclose this fact clearly and conspicuously is an unfair and deceptive practice.

PAR. 9. In the further course and conduct of their aforesaid business, respondents have represented and are representing that, at the buyer's request, respondents will sell a buyer's gemstone for the buyer at respondents' then current selling price. Respondents have failed to disclose the material facts that:

A. An individual who sells his or her gemstones through respondents will be required to pay a fee of approximately 17 percent for such service.

B. An individual who attempts to sell his or her gemstones through respondents may have to wait many months before receiving the proceeds from the sale.

The failure to disclose such facts clearly and conspicuously is an unfair and deceptive practice.

PAR. 10. In the further course and conduct of their aforesaid business, respondents have offered and are offering for sale diamonds ranging in size from .04 carats to .6 carats, which they have denominated "liquidity" and "currency" diamonds. Said diamonds have been and are being sold to individual consumers accompanied by certificates issued by respondents attesting to the quality of the diamonds. In connection with the offering for sale of these diamonds, respondents have represented, and are representing, directly or by implication, that said diamonds are excellent investments, are highly liquid, and that there is little or no financial risk involved in the purchase of said diamonds. Respondents have failed to disclose the material facts that:

A. There is no active investors' market in which many of these diamonds can be sold.

B. There are few outlets for an individual investor to resell many of these diamonds and resale for all of them is made more difficult by

the lack of certification by a recognized independent gemological laboratory.

C. The principal resale outlets, other than respondents, available to individual investors for sale of many of these diamonds are retail jewelers. Many jewelers will not buy diamonds from an individual, and those that do will generally pay an individual substantially less than what the jeweler would have to pay his customary supplier for the same diamonds.

The failure to disclose such facts clearly and conspicuously is an unfair and deceptive practice.

PAR. 11. In the further course and conduct of their aforesaid business, respondents have provided and are providing certificates issued by themselves attesting to certain characteristics of the diamonds sold. Respondents have represented and are representing, directly or by implication, that with these certificates the individual can readily determine the quality and value of the diamonds purchased. In truth and in fact, an individual cannot determine the quality and value of the diamonds purchased using the certificates provided by respondents.

Respondents have failed to disclose that:

A. The information provided by respondents' certificates is not sufficient to define the characteristics of the diamonds for purposes of enabling a purchaser to reliably determine the quality and value of the diamonds purchased.

B. Certificates for diamonds issued by the company selling the diamonds generally have no recognized value as certification.

The failure to disclose such facts clearly and conspicuously is an unfair and deceptive practice.

PAR. 12. In the further course and conduct of their aforesaid business, respondents have made and are making various representations concerning the past appreciation in value of diamonds. Typical and illustrative of said representations, but not all inclusive thereof, are the following:

1. If you had invested $10,000 in diamonds with American Diamond Company in 1975, you would have over $50,000 today.

2. Over the past decade, the value of diamonds has increased by 800%.

3. Investment quality diamonds have appreciated 40% over the last half decade on an annualized basis.

4. No price declines in over 45 years.

PAR. 13. By and through the use of the above representations, and others of similar import and meaning, but not expressly set out herein, respondents have represented, and are now representing, directly or by implication, that all sizes and grades of diamonds sold by respondents have enjoyed rates of appreciation comparable to those represented in Paragraph Twelve.

In truth and in fact, diamonds of different sizes and different grades sold by respondents have not experienced rates of appreciation comparable to those set forth in Paragraph Twelve.

Therefore, the representations set forth in Paragraph Twelve and others of similar import and meaning, are false, misleading, and deceptive.

PAR. 14. Further, in making the representations set forth in Paragraph Twelve and others of similar import and meaning, respondents have failed to disclose the material facts that:

A. There are substantial differences in the past appreciation of diamonds of different carat weight, color, cut, and clarity.

B. The fact that diamonds or other gemstones may have appreciated in the past is no guarantee that they will appreciate in the future.

The failure to disclose such facts clearly and conspicuously is an unfair and deceptive practice.

PAR. 15. In the further course and conduct of their aforesaid business, respondents have used and are using in their promotional literature certain charts and graphs purporting to demonstrate the appreciation history and economic performance of diamonds as an investment. Respondents have represented and are representing, directly or by implication, that these various charts and graphs were prepared or published by sources independent of respondents.

In truth and in fact, certain of the charts and graphs used in respondents' promotional literature and attributed to independent sources were not prepared or published by those sources. Therefore, the above representations are false, misleading, and deceptive.

PAR. 16. In the further course and conduct of their aforesaid business, respondents have made representations concerning future appreciation in the price of gemstones. For example, in August, 1980 respondents represented that their "liquidity diamonds" would appreciate 40% within the next six months. At the time this and similar representations were first made and subsequently disseminated, respondents did not possess and rely upon a reasonable basis for such claims of future performance. Thus, the dissemination of

such representations was, and is, an unfair and deceptive act or practice.

PAR. 17. In the further course and conduct of their aforesaid business, respondents have made representations concerning recent price appreciations for their "liquidity diamonds." For example, in November, 1980 respondents represented that general market demand for diamonds had caused a third 5 percent price increase within a four month period, and that the price would increase again on December 8, 1980. By and through such statements and others of similar import and meaning, respondents have represented and are representing, directly or by implication, that respondents' price increases reflect general market price increases.

In truth and in fact, respondents' price increases do not reflect general market price increases, and, at the time these representations were made, the market prices for the diamonds respondents denominate "liquidity diamonds" had not risen in the manner represented by respondents. Therefore, the above representations are flase, misleading and deceptive.

PAR. 18. In the further course and conduct of their aforesaid business, respondents have represented and are representing, directly or by implication, that they are major cutters, and wholesale rough brokers who cut, finish, polish and maintain an inventory of gemstones and for this reason are able to offer their clients the lowest possible prices available to the investor.

PAR. 19. In truth and in fact, respondents are not major cutters and wholesale rough brokers. They do not cut, finish, or polish their own stones and in many instances they do not have in inventory the particular stones that they sell. Therefore, the representations set forth in Paragraph Eighteen are false, misleading, and deceptive.

PAR. 20. In the further course and conduct of their business, respondents have engaged in the following acts and practices:

A. Deposited purchasers' funds into their bank accounts upon receipt of such funds and failed either to ship the merchandise ordered or to refund money for six weeks to one year.

B. Sold gemstones not in their inventory and then failed to make a good faith effort to acquire the gemstones sold in order to effect delivery within a reasonable time.

C. Appropriated purchasers' funds received from the sale of gemstones for purposes other than effecting prompt delivery of gemstones sold.

D. In instances where purchasers' undelivered gemstones had appreciated in value after sale, attempted to persuade such purchas-

ers to accept gemstones which had not experienced as much appreciation.

E. In instances where they have resold purchasers' gemstones through their liquidation service and received the funds from such sale, failed to promptly forward the proceeds of the sale to the seller.

F. Failed to answer letters of inquiry from customers and made inadequate and untrue responses to customers who inquired about late delivery.

The acts and practices set forth above are deceptive and unfair.

PAR. 21. In the further course and conduct of their aforesaid business, respondents have represented and are representing that they could and would deliver gemstones purchased within a specific or reasonable period of time. Further, respondents have represented and are representing, directly or by implication, that they could and would deliver to purchasers a gemstone with specifically defined characteristics.

PAR. 22. In truth and in fact, in a substantial number of instances, respondents have failed to deliver purchased gemstones within the specific time represented or within a reasonable period of time. Further, in a substantial number of instances, respondents have failed to deliver to purchasers gemstones with characteristics comparable to those specified in the purchase agreement. Therefore, the representations set forth in Paragraph Twenty-One are false, misleading, and deceptive.

PAR. 23. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as merchandise sold by respondents.

PAR. 24. The use by respondents of the aforementioned false, misleading, unfair and deceptive statements, representations, acts and practices, directly or by implication, and the failures of respondents to disclose the aforementioned material facts, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of respondents' gemstones by reason of said erroneous and mistaken belief.

PAR. 25. The acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal

Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Decision and Order

The Federal Trade Commission has initiated an investigation of certain acts and practices of the respondents Thomas L. Baker, Inc. and American Diamond Company [hereinafter referred to as respondents], and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered any comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules; and

The respondents having filed a petition for reorganization under Chapter 11 of the Bankruptcy Code (11 U.S.C. 362) on October 23, 1981; and

The respondents and complaint counsel having thereafter submitted to the Commission a revised Agreement Containing Consent Order; and

The Commission having considered and accepted the revised Agreement; and

Now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Thomas L. Baker, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 4455 Morena Boulevard, San Diego, California.

Respondent American Diamond Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 4455 Morena Boulevard, San Diego, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondent Thomas L. Baker, Inc., a corporation, respondent American Diamond Company, a corporation, their successors and assigns, and their officers, and respondents' agents, representatives, brokers, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the purchasing, advertising, offering for sale, sale or distribution of any diamond, ruby, or any other precious or semi-precious stone, (hereinafter gemstones) or other merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

(a) A diamond or ruby or other gemstone is an investment which can be easily or quickly sold by an individual investor for a price substantially the same as what an individual would have to pay to purchase such gemstone from respondent(s) or another commercial source.

(b) A person can sell a diamond or ruby or other gemstone through respondent(s) as easily as he or she could sell a stock or bond through a stock broker.

(c) There is at any time an established, generally recognized market price for a diamond or other gemstone at which an individual could easily sell or exchange his or her gemstone(s).

2. Misrepresenting in any manner, directly or by implication, the ease with which an individual can resell a diamond, ruby or other gemstone or the price an individual is likely to receive upon such resale.

3. Failing to disclose, clearly and conspicuously, in writing and orally, prior to the execution of any contract for sale of any gemstone(s), the following information:

(a) Gemstones are not as easy to sell as many other investments. If you seek a quick sale of a gemstone you will in many instances only be able to get a price substantially lower than the current selling price of the gemstone.

(b) If you resell your gemstones through [name company] you will be required to pay liquidation/consignment fees of [insert fees].

(c) If you try to resell your gemstones through [name company] you may in some instances have to wait a substantial period of time before the gemstones are sold. In addition, a sale on consignment is not completed until thirty (30) days after the gemstones have been delivered to the new purchaser. This allows the new purchaser the right to inspect and return the gemstones.

(d) There are substantial differences in the past appreciation of gemstones of different weight, color, cut and clarity. Also, the fact that particular gemstones may have appreciated in the past is no guarantee that they will appreciate in the future.

Provided, however, That if respondents do not offer a resale service for gemstones the following disclosures shall be made in lieu of those required by Paragraphs 3(b) and (c) of this order:

(b) If you resell your gemstone through a company handling such resales, you may be required to pay substantial liquidation/consignment fees.

(c) If you try to resell your gemstones through a company handling such resales, you may in some instances have to wait a substantial period of time before the gemstones are sold.

4. Failing to disclose, clearly and conspicuously, in writing and orally, prior to the execution of any contract for sale of any diamond(s), ranging in size from .04 to .60 carats, the following information:

(a) [Name company] is the principal place for you to resell these diamonds. Resale for profit to other outlets such as retail jewelers may be difficult. Many jewelers will not buy diamonds from an individual. Those that do generally pay substantially less than what they pay their customary suppliers.

(b) Resale through outlets other than [name company] may be

made more difficult by the lack of certification by a recognized independent gemological laboratory.

(c) The grading on [name company] certificates accompanying these diamonds is for identification purposes only and not for purposes of valuation. More specific grading may be necessary to enable a purchaser to resell through anyone other than [name company].

Provided, however, That if respondents do not offer a resale service for gemstones the following disclosures shall be made in lieu of these required by Paragraphs 4(a), 4(b), and 4(c) of this order:

(a) The principal place for you to resell these diamonds is to outlets such as retail jewelers. Resale for profit to outlets such as retail jewelers may be difficult. Many jewelers will not buy diamonds from an individual. Those that do generally pay substantially less than what they pay their customary suppliers.

(b) Resale of these diamonds may be made more difficult by the lack of certification by a recognized independent gemological laboratory.

(c) The grading on [name company] certificates accompanying these diamonds is for identification purposes only and not for purposes of valuation. More specific grading may be necessary to enable a purchaser to resell these diamonds.

5. Misrepresenting in any manner, directly or by implication, the past appreciation in value of any diamond(s) or other gemstone(s).

6. Making any representation, directly or by implication, concerning the past appreciation of any diamond(s), or other gemstone(s) without:

(a) Disclosing, clearly and conspicuously, the type of diamond or other gemstone, in terms of size, color, cut, clarity, or other relevant characteristic, to which the past appreciation representation relates; and

(b) Having a reasonable basis upon which to make the claim.

7. Misrepresenting in any manner directly or by implication, the source of any graph or chart or of any information depicted in any promotional material or other presentation relating to the sale of any gemstone(s).

8. Making any representation, directly or by implication, in any advertising or sales promotional material or orally during the course

of any sales presentation, concerning the future appreciation of any diamond(s) or other gemstone(s) unless at the time of such representation respondents possess and rely upon a reasonable basis for the representation.

9. Failing to maintain accurate records, which may be inspected by Commission staff members upon reasonable notice, which:

(a) Consist of documentation in support of any representation concerning the past or future appreciation of any diamond or other gemstone included in any advertising or sales promotional material disseminated by respondents, insofar as the text of such representation is prepared, or is authorized and approved, by any person who is an officer or employee of respondents or by any advertising agency engaged for such purpose by respondents; and

(b) Provide the basis upon which respondents relied as of the time the representation was made.

10. Misrepresenting in any manner, directly or by implication, that respondents' own price increases reflect general market price increases.

11. Representing, directly or by implication, that:

(a) Respondents are "sight" buyers of diamonds from DeBeers Central Selling Organization.

(b) Respondents are wholesale rough brokers of diamonds or other gemstones.

(c) Respondents maintain an inventory of the gemstones thay sell unless at the time such representation was made respondents actually had in their possession or on consignment the exact gemstones about which the representation was made.

12. Misrepresenting in any manner, directly or by implication, the business activities engaged in by respondents, including how respondents' pricing compares to price levels at various positions on the gemstone distribution chain such as cutter or wholesale levels.

13. Failing to disclose, clearly and conspicuously, in writing and orally, prior to the execution of any contract for sale of any colored gemstone, the following information:

(a) If your gemstone is re-certified, it may receive a different grade. This may affect its value. There are two reasons for this. First, colored gemstone grading is, in part, subjective. Second, procedures used for grading colored gemstones may change.

(b) A colored gemstone which receives a higher grade on a

certificate is not necessarily more valuable than one receiving a lower grade. Dealers in colored gemstones may differ significantly in their assessment of the value of particular gemstones and will often rely on personal inspection in setting a value for a gemstone instead of relying only on a certificate.

(c) The above characteristics of colored gemstone grading and valuation are a risk you should consider before investing in colored gemstones.

14. Failing to comply with Federal Trade Commission Rule concerning Mail Order Mechandise, 16 C.F.R. 435.

15. Failing to answer, and to answer promptly, inquiries by or on behalf of any customer regarding any purchase made from respondents.

16. Failing to deliver a gemstone with the specific characteristics ordered unless a customer has agreed in writing to a substitution.

17. Failing to deliver the proceeds of a gemstone sale which the respondents have made on behalf of a previous customer or other party to such customer or party within 10 working days of completion of sale.

II.

It is further ordered, That the oral affirmative disclosures required by Paragraphs 3, 4, and 13 of this order need not be made by respondents if gemstones are sold for jewelry and in the sales agreement so identified and the following disclosure is made on the front page of the sales agreement covering each such sale:

Items designated as jewelry grade are not sold by [name of company] for investment purposes and no representation is made that such items are investment quality or suitable for investment.

III.

It is further ordered, That the written affirmative disclosures required by Paragraphs 3, 4, and 13 of this order shall be made in the manner described below:

RISK FACTORS YOU SHOULD CONSIDER IF YOU ARE PURCHASING GEMSTONES AS AN INVESTMENT

1. Gemstones are not as easy to sell as many other investments. If you seek a quick sale of a gemstone you will in many instances

only be able to get a price substantially lower than the current selling price of the gemstone.

2. There are substantial differences in the past appreciation of gemstones of different weight, color, cut and clarity. Also, the fact that particular gemstones may have appreciated in the past is no guarantee that they will appreciate in the future.

[If respondents offer a resale service for gemstones:]

3. If you resell gemstones through [name company] you will be required to pay liquidation/consignment fees of [insert fees].

4. If you try to resell your gemstones through [name company] you may in some instances have to wait a substantial period of time before the gemstones are sold. In addition, a sale on consignment if not completed until thirty (30) days after the gemstones have been delivered to the new purchaser. This allows the new purchaser the right to inspect and return the gemstones.

[If respondents do not offer a resale service for gemstones:]

3. If you resell your gemstones through a company handling such resales, you may be required to pay substantial liquidation/coinsignment fees.

4. If you try to resell your gemstones through a company handling such resales, you may in some instances have to wait a substanital period of time before the gemstones are sold.

FOR PURCHASERS OF DIAMONDS .04–.60 CARATS IN SIZE

[If respondents offer a resale service for gemstones:]

5. [Name company] is the principal place for you to resell these diamonds. Resale for profit to other outlets such as retail jewelers may be difficult. Many jewelers will not buy diamonds from an individual. Those that do generally pay substantially less than what they pay their customary suppliers.

6. Resale through outlets other than [name company] may be made more difficult by the lack of certification by a recognized independent gemological laboratory.

7. The grading on [name company] certificates accompanying these diamonds is for identification purposes only and not for purposes of valuation. More specific grading may be necessary to

enable a purchaser to resell through anyone other than [name company].

[If respondents do not offer a resale service for gemstones:]

5. The principal place for you to resell these diamonds is to outlets such as retail jewelers. Resale for profit to outlets such as retail jewelers may be difficult. Many jewelers will not buy diamonds from an individual. Those that do generally pay substantially less than what they pay their customary suppliers.

6. Resale of these diamonds may be made more difficult by the lack of certification by a recognized independent gemological laboratory.

7. The grading on [name company] certificates accompanying these diamonds is for identification purposes only and not for purposes of valuation. More specific grading may be necessary to enable a purchaser to resell these diamonds.

FOR PURCHASERS OF COLORED GEMSTONES

8. If your gemstone is re-certified, it may receive a different grade. This may affect its value. There are two reasons for this. First, colored gemstone grading is, in part, subjective. Second, procedures used for grading colored gemstones may change.

9. A colored gemstone which receives a higher grade on a certificate is not necessarily more valuable than one receiving a lower grade. Dealers in colored gemstones may differ significantly in their assessment of the value of particular gemstones and will often rely on personal inspection in setting a value for a gemstone instead of relying only on a certificate.

10. The above characteristics of colored gemstone grading and valuation are a risk you should consider before investing in colored gemstones.

This notice shall appear in all written advertising and promotional material used to sell any gemstone(s) except newspaper and magazine advertisements and one-page promotional material whose sole purpose is to solicit a prospective customer to request further information. The title "RISK FACTORS YOU SHOULD CONSIDER IF YOU ARE PURCHASING GEMSTONES AS AN INVESTMENT" shall be printed in no smaller than ten (10) point boldface type. The remainder of the notice shall be printed in type no smaller

than the smallest type otherwise in the advertising or no smaller than eight (8) point type, whichever is larger. The capitalization, punctuation and wording of the text and headings must be exactly as shown above.

This notice must also appear on the front page of all sales agreements or on a separate sheet of paper given to customers before they sign the sales agreement. The separate sheet may not contain any other writing. The notice required in this subparagraph shall be in the form set forth as follows:

1. At the bottom of the notice shall be the language "I have read this notice and understand what it says" and a place for the buyer's signature.
2. The text of the notice must be printed in no smaller than 9-point type and the heading "RISK FACTORS YOU SHOULD CONSIDER IF YOU ARE PURCHASING GEMSTONES AS AN INVESTMENT" must be 2 type points larger and boldface. The capitalization, punctuation and wording of the text and headings must be exactly as shown above.
3. The whole notice, from the word "RISK" to the words "what it says," must be printed in gothic, astron, avant garde, eras, frutiger, gill sans, grotesque, heldustry, helvetica, kabel, antique, optima, univers, vogue, americana, american typewriter, newtext, or quorum type in blue, blue-black, or black ink on white or buff background. If the notice is printed on the front page of a sales agreement on which other information is emphasized by the use of colored type, the notice must then be printed in the most conspicuous colored type used.
4. The whole notice from the word "RISK" to the space for the customer's signature, must be boxed with lines 2 points thick if the notice appears on the front page of a sales agreement.

The disclosures in Paragraph 4 only have to be made if the promotional material or contract relates to the sale of diamonds of .04 carats to .60 carats in size. The disclosures in Paragraph 13 only have to be made if the promotional material or contract relates to the sale of colored gemstones.

It is further ordered, That each customer be given at the time of sale a fully filled-in and legible copy of the sales agreement. Respondents shall keep a fully filled-in and legible copy of each sales agreement for three years after signing.

IV.

It is further ordered, That respondents herein shall notify the Commission at least 30 days prior to any change in the structure of any of the corporate respondents involving dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of any subsidiary, or any other change in the respective corporation which may affect compliance obligations arising out of this order.

V.

It is further ordered, That respondents distribute a synopsis of this order to all operating divisions of said corporations, and to present or future personnel, agents or representatives having sales, advertising, or policy responsibilities with respect to the subject matter of this order and that respondents secure from each such person a signed statement acknowledging receipt of said order.

VI.

It is further ordered, That respondents herein shall, within ninety (90) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have compiled with this order.

IN THE MATTER OF

THOMAS L. BAKER

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3096. Complaint, Sept. 28, 1982—Decision, Sept. 28, 1982*

This consent order requires a San Diego, Calif. corporate officer to cease, among other things, misrepresenting or failing to disclose material facts regarding the purchase of gemstones as investments, or their liquidity. The respondent is prohibited from misrepresenting the source of graphs or charts used in promotional literature; failing to disclose the limitations associated with the certificates issued by the firms to accompany their gemstones; or representing that their price increases reflect general market increases. Respondent is required to disclose both orally and in writing, before the execution of any contract for the sale of gemstones, among other things, that gemstones are not as easy to sell as other investments; that there are risks involved in the purchase of colored gemstones; and that diamonds .04 to .60 carats may be difficult to resell. Further, respondent is required to comply with the FTC's Mail Order Merchandise Rule and ensure that all personnel receive a synopsis of the order.

Appearances

For the Commission: *Curtis Yee, David C. Fix* and *Robert D. Friedman.*

For the respondent: *Jeffrey L. Davidson, Davidson, Holmes and Anderson,* Los Angeles, Calif.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent Thomas L. Baker [hereinafter referred to as respondent], and the respondent having been furnished with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, his attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of the complaint, a statement that the

* Complaint previously published at 100 F.T.C. 461 (1982).

signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered any comments filed therafter by interested persons pursuant to Section 2.34 of its Rules; and

The Commission having determined to issue separate orders against respondent Thomas L. Baker and the corporate respondents Thomas L. Baker, Inc. and American Diamond Company named in the caption hereof and having revised the language of this order to make clear its applicability to the individual respondent alone; and

Now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Thomas L. Baker is an officer and director of the following corporations. As such, he formulates, directs and controls the acts and practices of said corporations, and his principal office and place of business is located at the same address as that of said corporations.

Thomas L. Baker, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 4455 Morena Boulevard, San Diego, California.

American Diamond Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 4455 Morena Boulevard, San Diego, California.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That respondent Thomas L. Baker individually and

as an officer of Thomas L. Baker, Inc., a corporation, and American Diamond Company, a corporation, and respondent's agents, representatives, brokers, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the purchasing, advertising, offering for sale, sale or distribution of any diamond, ruby, or any other precious or semi-precious stone, [hereinafter gemstones] or other merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

(a) A diamond or ruby or other gemstone is an investment which can be easily or quickly sold by an individual investor for a price substantially the same as what an individual would have to pay to purchase such gemstone from the respondent or another commercial source.

(b) A person can sell a diamond or ruby or other gemstone through the respondent as easily as he or she could sell a stock or bond through a stock broker.

(c) There is at any time an established, generally recognized market price for a diamond or other gemstone at which an individual could easily sell or exchange his or her gemstone(s).

2. Misrepresenting in any manner, directly or by implication, the ease with which an individual can resell a diamond, ruby or other gemstone or the price an individual is likely to receive upon such resale.

3. Failing to disclose, clearly and conspicuously, in writing and orally, prior to the execution of any contract for sale of any gemstone(s), the following information:

(a) Gemstones are not as easy to sell as many other investments. If you seek a quick sale of a gemstone you will in many instances only be able to get a price substantially lower than the current selling price of the gemstone.

(b) If you resell your gemstones through [name company] you will be required to pay liquidation/consignment fees of [insert fees].

(c) If you try to resell your gemstones through [name company] you may in some instances have to wait a substantial period of time before the gemstones are sold. In addition, a sale on consignment is not completed until thirty (30) days after the gemstones have been delivered to the new purchaser. This allows the new purchaser the right to inspect and return the gemstones.

(d) There are substantial differences in the past appreciation of gemstones of different weight, color, cut and clarity. Also, the fact that particular gemstones may have appreciated in the past is no guarantee that they will appreciate in the future.

4. Failing to disclose, clearly and conspicuously, in writing and orally, prior to the execution of any contract for sale of any diamond(s), ranging in size from .04 to .60 carats, the following information:

(a) [Name company] is the principal place for you to resell these diamonds. Resale for profit to other outlets such as retail jewelers may be difficult. Many jewelers will not buy diamonds from an individual. Those that do generally pay substantially less than what they pay their customary suppliers.

(b) Resale through outlets other than [name company] may be made more difficult by the lack of certification by a recognized independent gemological laboratory.

(c) The grading on [name company] certificates accompanying these diamonds is for identification purposes only and not for purposes of valuation. More specific grading may be necessary to enable a purchaser to resell through anyone other than [name company].

5. Misrepresenting in any manner, directly or by implication, the past appreciation in value of any diamond(s) or other gemstone(s).

6. Making any representation, directly or by implication, concerning the past appreciation of any diamond(s), or other gemstone(s) without:

(a) Disclosing, clearly and conspicuously, the type of diamond or other gemstone, in terms of size, color, cut, clarity, or other relevant characteristic, to which the past appreciation representation relates; and

(b) Having a reasonable basis upon which to make the claim.

7. Misrepresenting in any manner, directly or by implication, the source of any graph or chart or of any information depicted in any promotional material or other presentation relating to the sale of any gemstone(s).

8. Making any representation, directly or by implication, in any advertising or sales promotional material or orally during the course of any sales presentation, concerning the future appreciation of any

diamond(s) or other gemstone(s) unless at the time of such representation respondent possesses and relies upon a reasonable basis for the representation.

9. Failing to maintain accurate records, which may be inspected by Commission staff members upon reasonable notice, which:

(a) Consist of documentation in support of any representation concerning the past or future appreciation of any diamond or other gemstone included in any advertising or sales promotional material disseminated by the respondent, insofar as the text of such representation is prepared, or is authorized and approved, by any person who is an officer or employee of the respondent or by any advertising agency engaged for such purpose by the respondent; and

(b) Provide the basis upon which the respondent relied as of the time the representation was made.

10. Misrepresenting in any manner, directly or by implication, that the respondent's own price increases reflect general market price increases.

11. Representing, directly or by implication, that:

(a) Respondent is a "sight" buyer of diamonds from DeBeers Central Selling Organization.

(b) Respondent is a wholesale rough broker of diamonds or other gemstones.

(c) Respondent maintains an inventory of the gemstones he sells unless at the time such representation was made the respondent actually had in his possession or on consignment the exact gemstones about which the representation was made.

12. Misrepresenting in any manner, directly or by implication, the business activities engaged in by the respondent, including how respondent's pricing compares to price levels at various positions on the gemstone distribution chain such as cutter or wholesale levels.

13. Failing to disclose, clearly and conspicuously, in writing and orally, prior to the execution of any contract for sale of any colored gemstone, the following information:

(a) If your gemstone is re-certified, it may receive a different grade. This may affect its value. There are two reasons for this. First, colored gemstone grading is, in part, subjective. Second, procedures used for grading colored gemstones may change.

(b) A colored gemstone which receives a higher grade on a certificate is not necessarily more valuable than one receiving a

lower grade. Dealers in colored gemstones may differ significantly in their assessment of the value of particular gemstones and will often rely on personal inspection in setting a value for a gemstone instead of relying only on a certificate.

(c) The above characteristics of colored gemstone grading and valuation are a risk you should consider before investing in colored gemstones.

14. Failing to comply with Federal Trade Commission Rule concerning Mail Order Merchandise, 16 C.F.R. 435.

15. Failing to answer, and to answer promptly, inquiries by or on behalf of any customer regarding any purchase made from the respondent.

16. Failing to deliver a gemstone with the specific characteristics ordered unless a customer has agreed in writing to a substitution.

17. Failing to deliver the proceeds of a gemstone sale which the respondent has made on behalf of a previous customer or other party to such customer or party within 10 working days of completion of sale.

II.

It is further ordered, That the written affirmative disclosures required by Paragraphs 3, 4, and 13 of this order shall be made in the manner described below:

RISK FACTORS YOU SHOULD CONSIDER BEFORE INVESTING IN GEMSTONES

1. Gemstones are not as easy to sell as many other investments. If you seek a quick sale of a gemstone you will in many instances only be able to get a price substantially lower than the current selling price of the gemstone.

2. If you resell gemstones through [name company] you will be required to pay liquidation/consignment fees of [insert fees].

3. If you try to resell your gemstones through [name company] you may in some instances have to wait a substantial period of time before the gemstones are sold. In addition, a sale on consignment is not completed until thirty (30) days after the gemstones have been delivered to the new purchaser. This allows the new purchaser the right to inspect and return the gemstones.

4. There are substantial differences in the past appreciation of gemstones of different weight, color, cut and clarity. Also, the fact

that particular gemstones may have appreciated in the past is no guarantee that they will appreciate in the future.

FOR PURCHASERS OF DIAMONDS .04–.60 CARATS IN SIZE

5A. [Name company] is the principal place for you to resell these diamonds. Resale for profit to other outlets such as retail jewelers may be difficult. Many jewelers will not buy diamonds from an individual. Those that do generally pay substantially less than what they pay their customary suppliers.

5B. Resale through outlets other than [name company] may be made more difficult by the lack of certification by a recognized independent gemological laboratory.

5C. The grading on [name company] certificates accompanying these diamonds is for identification purposes only and not for purposes of valuation. More specific grading may be necessary to enable a purchaser to resell through anyone other than [name company].

FOR PURCHASERS OF COLORED GEMSTONES

6A. If your gemstone is re-certified, it may receive a different grade. This may affect its value. There are two reasons for this. First, colored gemstone grading is, in part, subjective. Second, procedures used for grading colored gemstones may change.

6B. A colored gemstone which receives a higher grade on a certificate is not necessarily more valuable than one receiving a lower grade. Dealers in colored gemstones may differ significantly in their assessment of the value of particular gemstones and will often rely on personal inspection in setting a value for a gemstone instead of relying only on a certificate.

6C. The above characteristics of colored gemstone grading and valuation are a risk you should consider before investing in colored gemstones.

A. This notice shall appear in all written advertising and promotional material used to sell any gemstone(s) except newspaper and magazine advertisements and one-page promotional material whose sole purpose is to solicit a prospective customer to request futher information. The title "RISK FACTORS YOU SHOULD CONSIDER BEFORE INVESTING IN GEMSTONES" shall be printed in no smaller than ten (10) point boldface type. The remainder of the notice shall be printed in type no smaller than the

smallest type otherwise in the advertising or no smaller than eight (8) point type, whichever is larger. The capitalization, punctuation and wording of the text and headings must be exactly as shown above.

B. This notice must also appear on the front page of all sales agreements or on a separate sheet of paper given to customers before they sign the sales agreement. The separate sheet may not contain any other writing. The notice required in this subparagraph shall be in the form set forth as follows:

1. At the bottom of the notice shall be the language "I have read this notice and understand what it says" and a place for the buyer's signature.

2. The text of the notice must be printed in no smaller than 9-point type and the heading "RISK FACTORS YOU SHOULD CONSIDER BEFORE INVESTING IN GEMSTONES" must be 2 type points larger and boldface. The capitalization, punctuation and wording of the text and headings must be exactly as shown above.

3. The whole notice, from the word "RISK" to the words "what it says," must be printed in gothic, astro, avant garde, eras, frutiger, gill sans, grotesque, heldustry, helvetica, kabel, antique, optima, univers, vogue, americana, american typewriter, newtext, or quorum type in blue, blue-black, or black ink on white or buff background. If the notice is printed on the front page of a sales agreement on which other information is emphasized by the use of colored type, the notice must then be printed in the most conspicuous colored type used.

4. The whole notice from the word "RISK" to the space for the customer's signature, must be boxed with lines 2 points thick if the notice appears on the front page of a sales agreement.

The disclosures in Paragraph 4 only have to be made if the promotional material or contract relates to the sale of diamonds of .04 carats to .60 carats in size. The disclosures in Paragraph 13 only have to be made if the promotional material or contract relates to the sale of colored gemstones.

It is further ordered, That each customer be given at the time of sale a fully filled-in and legible copy of the sales agreement. Respondent shall keep a fully filled-in and legible copy of each sales agreement for three years after signing.

III.

It is further ordered, That the respondent herein shall notify the

Commission at least 30 days prior to any change in the structure of Thomas L. Baker, Inc. or American Diamond Company involving dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of any subsidiary, or any other change in the respective corporation which may affect compliance obligations arising out of this order.

IV.

It is further ordered, That the respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment if the business or employment is similar in nature to respondent's present employment. Such notice shall include respondent's current business or employment in which he is engaged as well as a description of his duties and responsibilities.

V.

It is further ordered, That respondent distribute a synopsis of this order to all operating divisions of said corporations, and to present or future personnel, agents or representatives having sales, advertising, or policy responsibilities with respect to the subject matter of this order and that respondent secure from each such person a signed statement acknowledging receipt of said order.

VI.

It is further ordered, That the respondent herein shall, within ninety (90) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with this order.

IN THE MATTER OF

AMREP CORPORATION

DECISION AND ORDER REGARDING GENERAL DEVELOPMENT CORPORATION

Docket 9018. Decision and Order, Sept. 30, 1982

This agreement contains an order as to General Development Corporation and was entered into by General Development and FTC Complaint Counsel In the Matter of AMREP Corporation, Docket 9018. The AMREP complaint alleges that AMREP and its subsidiary, Silver Springs Shores, Inc. have used unfair and deceptive practices in the sale of undeveloped land. General Development Corporation, a Miami, Fla. company which is not affiliated with AMREP and is not a party to Docket 9018, has agreed to purchase all remaining Silver Springs Shores properties conditioned upon the Federal Trade Commission's assurance that it will not be considered as a successor or assign of AMREP within the meaning of the Federal Trade Commission Act, or subject to any order or judgment stemming from Docket 9018. The agreement offers such assurance in exchange for General Development's good faith and performance of duties set forth in the accompanying order. The order requires, among other things, that General Development offer to buy back or exchange certain Silver Springs Shores lots in accordance with terms specified in the order, and emphasize in its sales representations and promotional materials that lots in Silver Springs Shores should be purchased for use by the buyer rather than as an investment. The order further requires the company to undertake a continuing surveillance program designed to ensure that unauthorized sales representations are not made in land sales presentations.

Appearances

For the Commission: *Jon R. Calhoun* and *George E. Schulman.*

For the respondent: *Wayne Allen,* in-house counsel, General Development Corp., Miami, Fla.

DECISION AND ORDER REGARDING GENERAL DEVELOPMENT CORPORATION

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and after trial of the matter, and the Initial Decision of the Administrative Law Judge having been issued, and General Development Corporation having sought to purchase Silver Springs Shores, one of the land developments that are the subject of this matter; and

General Development Corporation, its attorney, and counsel for the Los Angeles Regional Office of the Federal Trade Commission

having thereafter executed an agreement containing an order, a statement by General Development Corporation that it does not contest the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for purposes of providing assurances to General Development Corporation that it will not be held to be a successor or assign of respondent and of providing for certain benefits to be offered by General Development Corporation to the purchasers of property at Silver Springs Shores, a statement that the agreement does not constitute an admission by General Development Corporation that the law has been violated, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the matter and having thereupon accepted the executed agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the authority granted by the Federal Trade Commission Act, The Commission's Rules of Practice, and the Administrative Procedure Act [at 5 U.S.C. 554(e)], the Commission hereby makes the following jurisdictional findings and enters the following order:

1. General Development Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, and is a wholly-owned subsidiary of GDV, Inc., a Delaware corporation. GDV, Inc. is a majority-owned subsidiary of City Investing Company. General Development Corporation has its office and principal place of business located at 1111 South Bayshore Drive, in the City of Miami, State of Florida.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents and parties, and the proceeding is in the public interest.

Order

I. *It is ordered,* That, in return for General Development Corporation's good faith and substantial performance of the duties set forth in this order, General Development shall not be held or considered to be a successor or assign of AMREP Corporation or its subsidiary, Silver Springs Shores, Inc., within the meaning of the Federal Trade Commission Act or any rules or regulations adopted thereunder, and shall not be subject to any cease and desist order, other order, action, or judgment by the Commission in Docket No. 9018 by virtue of General Development purchasing property at Silver Springs Shores; and additionally, General Development shall

not be subject to any order or judgment entered in any related civil action brought by the Federal Trade Commission under Section 19 of the Federal Trade Commission Act (FTCA), 15 U.S.C. 57b.

II. *It is further ordered,* That:

A. General Development will offer to buy back the lots of Silver Springs Shores deeded lot owners at a purchase price of Two Thousand Dollars ($2,000.00) for each single family residential lot. Lot owners will be offered their choice of the following terms: the payment by General Development of the $2,000 principal amount over an eight (8) year period at six percent (6%) interest; payment at three percent (3%) interest over a six (6) year period; or payment over a four (4) year period with no interest. General Development will extend its initial buy-back offer without limitation to all lot owners who are original purchasers from Silver Springs Shores, Inc. and who were issued their deed by Silver Springs Shores, Inc. at least sixty (60) days prior to the date when the offer is extended. The offer to purchase will be extended annually for a period of five (5) years to those persons receiving deeds from Silver Springs Shores, Inc. after the cut-off date of the initial offering. In addition, General Development shall extend the same offer, using the same procedures, to persons who were not the original purchasers from AMREP but who purchased a lot or who executed their assignment of the installment contract for a lot prior to March 31, 1982.

A written buy-back offer will be extended to each such eligible person listed by name and address on a true and accurate list of all current and past deeded lot owners that Silver Springs Shores, Inc. is required to provide under its sales agreement with General Development. The mailing of the offer shall be by first-class mail, postage-prepaid, address correction requested, return receipt requested, with delivery to addressee only. Within sixty (60) days after the mailing, for any addressee for whom no return receipt has been received, General Development shall attempt to obtain a current or more recent address for the lot owner by examining the records of the Marion County, Florida, assesor's office. If a current or more recent address is found through these procedures, a copy of the offer shall be sent within twenty (20) days after such finding to the new address using the same means described herein.

General Development will, for informational purposes, send out a letter describing the impending repurchase offer within sixty (60) days of the closing of its purchase from Silver Springs Shores. It may include in its announcement its description of additional programs described in this agreement. General Development and Complaint

Counsel have agreed on the form of the announcement letter which is set forth in Exhibit A attached hereto. No contact shall be made by GDC with any above-listed purchaser prior to this announcement.

The actual offer to purchase will be extended initially by General Development within eighteen (18) months after the date of the closing of its purchase from Silver Springs Shores, Inc. The actual offer shall convey the terms of the offer in a neutral manner, neither recommending nor discouraging the offeree's acceptance. The offer communication shall contain the same recitation of the alternative programs that is set forth in Exhibit A; however, the offer to repurchase shall be set forth on the first page of the communication and shall be the only offer or description on that page. The communication shall not refer in any manner to the Federal Trade Commission or to this agreement or order. At least thirty (30) days prior to the proposed mailing date, GDC shall submit a draft of the communication to Commission staff for determination of its conformity to Exhibit A.

Those to whom the actual offer is extended will have a period of one hundred twenty (120) days from the date of the mailing to accept the offer of purchase. The first installment payment to those lot owners who accept the offer shall be mailed not later than ninety (90) days after the expiration of the 120 day acceptance period. Subsequent installments shall be paid annually on the anniversary of the initial payment. The buy-back program will not be available to any employees or relatives thereof of either AMREP, General Development, or any of their subsidiaries.

B. To be effective thirty (30) days after the mailing of Exhibit A, General Development will also offer to deeded lot owners at Silver Springs Shores the right to transfer their ownership of property from the lot originally purchased to an available comparable or higher priced lot in Silver Springs Shores or in General Development's projects of Port Charlotte, Port St. Lucie, Port Malabar, Port LaBelle, Vero Shores, Vero Beach Highlands, Sebastian Highlands and Port St. John. This offer shall remain effective for a period of ten years, but is limited to owners of SSS lots that were sold originally by AMREP. It is not available to those who purchase at SSS from General Development. The purchaser shall receive a credit for the principal paid in under his purchase contract, plus the difference between the price he originally paid and the current sales price for that lot. The sales price of the lot traded in and the sales price of the lot received will be set at that amount at which the respective lots are currently priced by General Development utilizing its then

current standard pricing formula which it applies equally to all properties. For example:

TRADE TO COMPARABLE NEW LOT

Current Selling Price - Old Lot	$10,295
Original Purchase Price - Old Lot	3,595
Lot Price Increase	$ 6,700
Current Selling Price - New Lot	$10,295
Less Price Increase Applied	-6,700
Less Principal Paid on Original Purchase	-3,595
BALANCE DUE ON NEW LOT	-0-

TRADE TO HIGHER PRICED NEW LOT

Current Selling Price - New Lot	$12,500
Less Lot Price Increase Applied	-6,700
Less Principal Paid on Original Purchase	-3,595
BALANCE DUE ON NEW LOT	$ 2,205

C. General Development will, at all times during which it is engaged in either the sale of lots or homes at Silver Springs Shores, but in no event for less than ten (10) years from the initial date of the actual offer to purchase, extend to all deeded lot owners in Silver Springs Shores the right to trade in their lot and receive a credit of the principal paid in under their purchase contract, plus the difference between the price they originally paid and the current sales price for that lot, toward the purchase of a General Development home and lot in any available shelter building area in Silver Springs Shores. "Shelter building area" is defined for the purposes of this agreement and order as those home construction areas where General Development only sells homes and lots as a unit or package. General Development will always make available to deeded Silver Springs Shores lot owners shelter building lots in a shelter building area where there exist at least twenty-five (25) homes already constructed. In addition, General Development will extend to all deeded lot owners in Silver Springs Shores the right to trade in their lot towards a General Development home and lot in General Development's projects of Port Charlotte, Port St. Lucie, Port Malabar, Port LaBelle, Vero Beach Highland, Vero Shores, Sebastian Highlands, or Port St. John. In any trade to one of these additional projects, the lot owner will be credited for the principal paid in under his purchase contract, plus a credit for the difference between the price he originally paid and the current sales price for that lot, such latter credit not to exceed 5% of the sales price of the General Development home and lot.

For example, a trade for a home and lot in Silver Springs Shores would work as follows:

SINGLE LOT TRADE ON HOME PURCHASE IN SSS

Assumption on Lot Traded In:

Current Selling Price	$10,295
Original Purchase Price	3,595
Increase in Selling Price	6,700
TOTAL CREDIT APPLIED	$10,295

Terms of $76,985 Home Sale (Home $58,990, Lot $17,995)

Deposit	$ 1,500
Lot Credit Applied	10,295
Cash at Closing	7,490
Mortgage Loan	57,700
TOTAL	$76,985

D. General Development shall provide lot owners in Silver Springs Shores a public offering statement if they desire to exchange or trade in their lot for a lot in another of General Development's projects or for one in another area of Silver Springs Shores not covered by the public offering statement they originally received.

E. General Development will, at all times during which it is engaged in either the sale of lots or homes at Silver Springs Shores, but in no event for less than ten (10) years from the initial date of the actual offer to purchase, maintain an inventory of building lots in Silver Springs Shores within one-half mile of an existing shelter building area. This inventory of building lots will be made available to outside builders and to owners of Silver Springs Shores lots who wish to trade in their current lots and use an independent builder to construct a dwelling. These building lots will contain the same provisions for water and sewage disposal as are contained in General Development's shelter building areas. The building lots will be offered at the same price placed on comparable building lots by General Development in the marketing of its home and lot packages. The trade-in credit will be computed in the same manner as in the example given above for a house and lot package at Silver Springs Shores. The sale or trade of these building lots may contain a provision mandating the commencement of construction of a home within a specified period of time, not to be less than 90 days from the consummation of the lot trade-in or purchase. General Development shall have approximately twenty five (25) of these building lots available at all times under this program. Up to a total of five

hundred (500) building lots will be made available under this program.

F. General Development shall provide to the Commission, upon request, an affidavit executed by its Chief Financial Officer certifying that lots being traded-in, and those traded-for, pursuant to this agreement, are priced under the same pricing formula General Development is using to price comparable Silver Springs Shores properties it is offering for sale. General Development will further, upon request, provide sufficient information to establish such equality of pricing. The Commission shall treat all such information provided as confidential commercial or financial information entitled to all protections against disclosure to third parties under the Freedom of Information Act.

G. Commencing thirty days after the mailing of Exhibit A, and at all times during which General Development is engaged in either the sale of lots or homes at Silver Springs Shores, but in no event for less than ten (10) years from the initial date of the actual offer to purchase, Florida Home Finders, Inc., General Development's resale subsidiary, will maintain an office in Silver Springs Shores and will actively list and market deeded lots and resale homes in Silver Springs Shores. Florida Home Finders, Inc. will maintain a block listing in the local Marion County multiple listing service indicating that it has available for resale Silver Springs Shores lots listed with it. The listing service will be maintained at no charge to Silver Springs Shores lot owners. In soliciting listings for the service, General Development shall advise the lot owners in Exhibit A and in any subsequent mailings on the subject that the current resale activity is very limited and that the solicitation should not be construed as indicating any increased demand.

H. General Development will emphasize in its sales presentations and promotional materials that the purchase of lots in Silver Springs Shores should be for use by the purchaser and will make no representation that the purchase of a lot at Silver Springs Shores should be considered an investment by the purchaser. General Development shall also continuously undertake internal surveillance programs of its marketing and sales personnel to ensure that no unauthorized investment sales representations in regard to lots are made orally by its salesmen in their presentations. General Development's current programs are described in Exhibit B attached hereto.

I. General Development shall make no use or mention of this agreement or order in any of its advertising or sales promotional literature or programs, written or oral. General Development will,

however, respond in a factual manner to any inquiries received from a customer or potential customer, or from the press. If the agreement with the Commission is required to be disclosed in any property report or other document by another government agency, General Development shall include the required information.

J. General Development will limit initial construction of shelter units in the existing shelter core areas of Silver Springs Shores to two thousand (2,000) shelter units. General Development will then go in succession to two remote areas and there develop active shelter construction and sales programs. These remote area shelter programs will be established in Units 24 and 25, and in Unit 42.

III. *It is further ordered,* That General Development Corporation shall within one (1) year after service upon it of this order, and annually thereafter until it is no longer engaged in either the sale of homesites or homes at Silver Springs Shores, but in no event for less than ten (10) years, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IV. *It is further ordered,* That General Development Corporation notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

EXHIBIT A

GDC LETTERHEAD

Dear _____:

This letter contains important information concerning the options available to you as a Silver Springs Shores lot owner, including an offer to repurchase your lot and a variety of exchange and building options. Please read this letter carefully and completely.

General Development Corporation is pleased to announce the acquisition of Silver Springs Shores, Ocala, Florida. General Development has seven projects situated on the East and West Coasts, as well as in South Central Florida. A brief description follows.

PORT CHARLOTTE/NORTH PORT is the company's oldest and largest project. It is located on the Gulf Coast, 25 miles north of Fort Myers and 45 miles south of Sarasota. Port Charlotte has 40,000 residents; North Port 12,500. The project borders Charlotte Harbor and its two tributaries, the Peace and Myakka Rivers.

PORT LABELLE was acquired in 1973 and is General Development's newest project. It comprises 31,700 acres along the southern bank of the Caloosahatchee River in

south-central Florida. Lying 30 miles east of Fort Myers, Port Labelle currently has about 1,600 residents.

PORT ST. LUCIE'S 28,000 residents celebrated the incorporated city's 20th anniversary in 1981. This project encompasses 48,000 acres straddling the North Fork of the St. Lucie River. Port St. Lucie is located 45 miles north of West Palm Beach. The paths of Florida's Turnpike and I-95, the two major East Coast roadways, pass through the project.

PORT MALABAR'S 43,000 acres make up about 90 per cent of the city of Palm Bay. Lying south of and adjacent to Melbourne on the East Coast, Port Malabar's population totals some 20,000.

VERO SHORES/VERO BEACH HIGHLANDS are on either side of Highway U.S. 1 about a half-hour's drive north of Port St. Lucie and five miles south of Vero Beach. Vero Shores' 411 acres front on the Indian River; west of U.S. 1, Vero Beach Highlands comprises 1,175 acres. Highlands population exceeds 1,500.

SEBASTIAN HIGHLANDS also is on U.S. 1, about halfway between Vero Shores/Vero Beach Highlands and Port Malabar. Its 5,060 acres make up most of the city of Sebastian and its 3,500 residents are three-quarters of the city's population.

PORT ST. JOHN is in Brevard County north of Port Malabar. Residents total over 2,000. Composed of some 5,500 acres, Port St. John is midway between Cocoa and Titusville.

Although you did not purchase your property from us, we are happy to welcome you into the General Development family. As a result of our acquisition, we are extending to you the ability to participate fully in the programs described in this letter, which include changing the location of your lot, using your lot as an exchange towards a house and lot package, using your lot as an exchange towards a lot in our immediate building areas, listing your lot for resale, or selling your lot back to us. Of course, there is no cost or obligation on your part since these privileges are being extended to you by virtue of your previous lot purchase at Silver Springs Shores.

Site Transfer Privilege

Your first benefit is the opportunity to trade the location of your Silver Springs Shores lot for another available lot of equal or greater value, in Silver Springs Shores or in any of our projects around the state, at any time during the next ten years. If you elect to do so, you will receive full credit for payments you have made and any increase in the sales price of your lot. The following example illustrates how the cost of a trade would be calculated.

TRADE TO COMPARABLE NEW LOT

Current Lot Site Selling Price	$10,295
Original SSS Lot Purchase Price	3,595
Sale Price Increase	6,700
Current Selling Price—New Lot	$10,295
Less Original Lot Price Increase	-6,700
Less Principal Paid on Original Lot	-3,595
Balance Due	-0-

TRADE TO HIGHER-PRICED LOT

Current Selling Price—New Lot	$12,500
Less Original Lot Price Increase	-6,700
Less Principal Paid on Original Lot	-3,595
Balance Due	$ 2,205

Housing Transfer Privilege

Alternatively, for a minimum of ten years and for as long as General Development is engaged in the sale of home and lot packages at Silver Springs Shores, you may trade your Silver Springs Shores lot towards the purchase of a home and lot package in a designated housing area in Silver Springs Shores or in any of General Development's other Florida projects.

Again, a trade-in at Silver Springs Shores allows you full credit for the sale price increase on your lot plus all principal paid since the date of your purchase from Silver Springs Shores. The following example illustrates what this means to you.

TRADE FOR HOME PURCHASE AT SSS

Current SSS Lot Selling Price	$10,295
Original SSS Lot Purchase Price (Assumes Paid-in-full)	3,595
Original Lot Price Increase	6,700
Total Credit Applied	$10,295

Example of $76,985 Home Sale (Home: $58,990, Lot: $17,995)

Deposit	$ 1,500
Lot Credit (from above)	10,295
Cash at Closing	7,490
Mortgage Loan	57,700
Total	$76,985

A trade for a home and lot package at any of General Development's other projects works the same except that the credit for the increase in the original lot selling price may be limited to 5% of the value of the house and lot package. In the example above, if this was a trade for a house and lot package at another project, the credit for the $6,700 price increase of the original lot would be limited to 5% × $76,985, or $3,849.25. Thus, the total credit would be:

Original Lot Purchase Price (Paid)	$3,595.00
Original Lot Price Increase (5% limit)	3,849.25
Total Credit	$7,444.25

Housing Area "Independent" Trade-In

This option is also available for at least ten years or for as long as General Development is engaged in the sale of home and lot packages at Silver Springs Shores. You may trade in your Silver Springs Shores lot towards the purchase of a lot in a designated housing area at Silver Springs Shores on which you may have a home constructed by a builder of your choice. Construction must start within a specified

period of time after the trade, not to be less than ninety (90) days nor more than 180 days. The trade-in credit will be the same as in the example given above for a house and lot package at Silver Springs Shores.

Listing Service

Commencing thirty days from the date of this letter, and continuing for the time period described in the above option, General Development's resale subsidiary, Florida Home Finders, Inc., will maintain an office in Silver Springs Shores and will list and market lots and homes in Silver Springs Shores. It will maintain a block listing (not identifying individual lots) in the local Marion County multiple listing service indicating that it has available for resale Silver Springs Shores lots that have been listed with it. You may have your lot listed at no charge to you. You are cautioned that there is currently very little resale activity and our offering of this service should not be construed as an indication of increased demand.

Buy-Back Program

In addition to the programs described above, General Development Corporation will offer to buy back your lot for the sum of two thousand ($2,000) dollars. This offer will be extended in a separate letter you will receive within the next eighteen months.

We will extend the offer to all lot owners who purchased directly from Silver Springs Shores (AMREP) and who will have had their deed issued by Silver Springs Shores at least sixty (60) days prior to the date of the offer. Additionally, we will extend the offer to persons who were not the original purchasers from Silver Springs Shores who purchased their lot or who assumed the payments on the installment contract prior to March 31, 1982. They must also be deeded as set forth above.

The offer will be extended annually for a period of five (5) years to qualified purchasers who receive deeds from Silver Springs Shores after the cutoff date of our original offering.

Once you receive the offer, you will have a period of one hundred and twenty (120) days from the date of mailing to accept the offer of repurchase. If you choose this program, you may select one of three payment plans:

1) Payments made to you over an eight-year period at a 6% annual interest rate—approximately $252/year plus interest.

2) Payments made to you over a six-year period at a 3% annual interest rate—approximately $336/year plus interest.

3) Payments made to you over a four-year period with no interest—$500/year.

We plan to add a new dimension and stimulus to Silver Springs Shores. We welcome you to the General Development family and look forward to serving you.

We are anxious to hear from you and invite you to write or call our Customer Service Department concerning additional information you desire or questions you might have concerning your rights and privileges. You may contact us by calling:

Name
Silver Springs Shores Information Service
Telephone #

or by writing:

Director of Customer Service
General Development Corporation
1111 South Bayshore Drive
Miami, Florida 33131

Sincerely,

Robert F. Ehrling
President

Draft Notes: All amounts shown are based on 1982 prices and no representation is made that such prices or amounts will remain the same. All are subject to change to reflect prices current when the letter is issued. GDC plans to include one of its color-photo advertising brochures when mailing this letter.

[This paragraph will be omitted from the actual letter.]

EXHIBIT B

SURVEILLANCE PROGRAM

General Development's Surveillance Program utilizes a private detective agency to do surveillance on a random basis at every General Development's sales office. The program is designed to have every sales source shopped at least twice a year (every six months). Additionally, special surveillance reports are done upon request of senior management in General Development's sales offices and also in broker affiliate offices. Currently General Development is using the Burns Detective Agency.

The investigator has been trained in the elements that constitute a proper sales presentation. He is asked to comment on the sales representative's appearance, general manner, content of the presentation and specific references to areas which might be considered of a problem nature, i.e.; does the salesman offer the property on an investment basis in his sales presentation? Are there any promises to buy back the property, etc.?

When we receive a favorable report from the investigator, we award the salesman with a gift. We call this the Sales Performance Review Awards Program. Those who receive unfavorable reports are dealt with in three ways:

1. Remedial work or retraining may be required if the infraction is of a minor nature or indicates a lack of knowledge.
2. Disciplinary action—If the infraction is of a minor but serious nature, the sales representative could be suspended for a period of time.
3. Termination will be recommended in all cases where serious infractions are involved.

In addition to the Surveillance Program, General Development's Legal Department keeps abreast of complaints regarding improper activities by salesmen and regularly requests investigation of any alleged improper activity which comes to the Legal Department's attention. Through these efforts all levels of management and the sales force are made aware of the Company's strong policy against any improper sales practices.

The result of these efforts is that General has found that the great majority of sales personnel shopped have done adequate to excellent jobs in their sales presentations. Disciplinary action has been instituted in cases where abuses were found and the program appears to be accomplishing what it was set up to do in controlling improper oral sales presentations.

IN THE MATTER OF

ENCYCLOPAEDIA BRITANNICA, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8908. Final Order, March 9, 1976—Modifying Order, Oct. 5, 1982

This order reopens the proceeding and modifies the Commission's order issued on March 9, 1976 (87 F.T.C. 421), *modified,* Oct. 28, 1980 (96 F.T.C. 778), by permitting the company's salespeople to use a business card to inform consumers of the reason for their visit, instead of the 3″ × 5″ card stating, "The purpose of this representative's visit is to solicit the sale of encyclopaedias," as previously required. Additionally, Britannica will no longer have to describe limits on potential earnings during initial interviews with prospective employees, but will be required to disclose, among other things, that these limitations exist, before an applicant accepts a sales position. The modified order also substitutes the original order's restrictions on Britannica's use of the words "free" and "regular" or "retail" price with FTC guidelines on those subjects. The modification also alters the definition of what is considered "truthful."

ORDER MODIFYING CEASE AND DESIST ORDER

The Commission issued its Final Order against respondents on March 9, 1976. The Order became effective on March 17, 1980, upon the United States Supreme Court's denial of respondents' petition for certiorari. On March 18, 1980, the Commission issued a stay of Paragraphs II.A, II.B, II.D, and II.E of the Order to allow the Commission to consider a petition from respondents to modify these provisions. On October 28, 1980, the Commission modified these four paragraphs.

On July 2, 1981, respondents filed another petition to reopen and modify the Order together with an application for a stay of the Order pending the Commission's determination of the petition. The Commission denied the stay application on August 5, 1981. On October 9, 1981, respondents filed a supplemental memorandum in support of their request to reopen the proceedings and set aside or modify the Order. Staff and respondents entered into negotiations which resulted in an agreement on proposed modifications to the Order.

In a separate petition to reopen the proceedings filed October 27, 1981, respondents also sought a permanent modification of Paragraph II.D of the Order. The petition presented persuasive evidence from a consumer survey that presentation of a business card before seeking admission to a customer's home or place of business would

communicate the sales purpose of a representative's call as well as the 3″ × 5″ card now required by the provision.

The Commission has considered respondents' petitions and staff's recommendations and has determined that the public interest requires that parts of the Order should now be modified.

Therefore, *it is ordered,* that the following paragraphs be modified as follows:

I.

A. Representing, directly or by implication, either orally or in writing, that:

* * * * * * *

(2) persons will be trained as management trainees, or for other positions of responsibility concerned with administrative office functions unless, in fact, a formal management training program is available to persons accepting employment on the basis of such representations; or misrepresenting, in any manner, the amount and type of training that will be given;

* * * * * * *

B. Misrepresenting, in any manner, the amount of income to be earned by any person or that may be earned by any person, the expenses that may be incurred by any person, the method of payment, or any condition or limitation imposed upon the compensation of any person.

C. Failing clearly and conspicuously to disclose in all advertising offering employment in any way involving door-to-door sales that respondent is recruiting persons for the sole purpose of soliciting or selling.

D. Failing clearly and conspicuously to provide, both orally and in writing, to any prospective sales employee at the initial face-to-face interview, and prior to executing any employment agreement with any such person, the following information:

(1) (a) that respondent is recruiting persons for the sole purpose of soliciting or selling;

(b) that the products or services being sold are encyclopedias or services to be used in connection therewith, or in the event that encyclopedias or such related services are not being sold, the products and services being sold; and

(c) the basis for compensating persons so engaged;

(2) that conditions or limitations upon the receipt of compensation, if any, do in fact exist, together with an example of such a material condition or limitation, and that all such conditions and limitations will be stated in detail in an interview in the event an offer of employment is made to such person;

* * * * * * *

(4) that expenses will be incurred by such person in performing required duties, together with an example of such a material expense, and that all such expense items will be stated in detail in an interview in the event an offer of employment is made to such person;

(5) [DELETED]

(6) that such soliciting or selling will be on an "in-home" basis, if such is the fact, or will include soliciting or selling on an "in-home" basis, if such is the fact.

E. Failing clearly and conspicuously to provide, both orally and in writing, to any prospective sales employee at an interview at which an offer of employment is made and prior to executing any employment agreement with any such person, the following information:

(1) A complete and detailed description of each condition and limitation imposed upon the receipt of any compensation;

(2) a complete and detailed description of any expense or expenses any such person may incur in performing the required duties;

(3)(a) the total number of sales employees employed by the office offering the position during the most recent calendar quarter, and (b) the number of sales employees employed by the office who, during the prior calendar quarter, received net earnings equivalent to or greater than the amount represented in the advertisement to which the prospective employee is responding; *provided, however,* that if the office has been in existence for less than three months or has fewer than five sales employees, respondents shall provide the information described above pertaining to the Division in which the office is located; *provided further,* that such information need not be furnished if the prospective sales employee contacts respondents more than ten days following the dissemination of the most recent advertisement that contains representations of earnings.

Respondent shall afford any prospective sales employee an adequate

opportunity to review and consider the above information prior to requesting execution of any employment agreement.

F. Failing to furnish to persons at an interview when an offer of employment is made, and prior to executing any employment agreement with any such person, a copy of Paragraphs I, II, III and VI of this Order, together with a cover letter as set forth in Appendix A* attached hereto. Respondent shall afford any prospective sales employee an adequate opportunity to review and consider these provisions of the Order prior to requesting execution of any employment agreement.

II.

A. Representing, directly or by implication, in any advertisement or promotional material that solicits participation in any contest, drawing, or sweepstakes, or solicits any response to any offer of merchandise, service, or information, and that employs any return card, coupon, or other device to respond to such solicitation, that a person who replies as requested will not be contacted directly by a salesperson for the purpose of selling respondents' products, unless such is the fact. Such advertisements or promotional material shall comply with this Paragraph only if they meet the criteria set forth in Appendix B.

B. Failing, upon the written request of the Associate Director for Enforcement or his designee, to (1) submit any advertisement or promotional material or (2) test any such advertisement or promotional material, using the procedure set forth in Appendix B, to determine whether it complies with Paragraph II.A.

C. Failing to disclose clearly and conspicuously, during any telephone contact and before commencing any sales presentation to prospective customers, the fact that the individual making the call is either soliciting the sale, rental, or lease of publications, merchandise, or services for respondents, or is arranging for a sales solicitation to be made, and that if the prospective customer so agrees, respondents will send a salesperson to visit said prospect for the purpose of soliciting the sale, rental, or lease of said publications, merchandise, or services.

D. Visiting the home or place of business of any person for the purpose of soliciting the sale, rental or lease of any publications, merchandise or service, unless at the time admission is sought into the home or place of business of such person, a business card of at

* *See* 87 F.T.C. 421 at 541 (1978).

least 2 inches by 3½ inches containing only the following information is presented to such person:

(1) the name of the corporation;
(2) the name of the salesperson;
(3) the term "sales representative";
(4) an address and telephone number at which the corporation or salesperson may be contacted;
(5) the product or the corporation logo or identifying mark.

* * * * * * *

F. Representing, directly or by implication, either orally or in writing that:

(1) Any person telephoning or visiting the home of any prospective purchaser is:

* * * * * * *

(c) telephoning or visiting the home of said prospect for the primary purpose of delivering or disseminating prizes, gifts, gift certificates, chances in any contest, drawing, sweepstakes, educational fund, or any other merchandise or item of chance.

* * * * * * *

(5) any publication, merchandise, or service is being offered free, without cost, or is given as a bonus or otherwise to any purchaser of respondents' publications, merchandise, or services, pursuant to any agreement to purchase, rent, or lease any other publication, merchandise, service, or combination thereof from respondent, unless respondent complies with all of the terms of the Federal Trade Commission's "Guide Concerning Use of the Word 'Free' and Similar Representations," 16 C.F.R. 251, which is hereby incorporated into this Order, and with any modifications or changes that are made to this Guide. All of the provisions of the aforesaid Guide shall be construed as mandatory and binding upon the respondents.

* * * * * * *

I. Representing to any person, directly or by implication, either orally or in writing that:

(1) any price is the retail, regular, usual or words of similar import or effect, price for any publication in any binding, merchandise or service, unless such price is an actual, bona fide price for

which each such publication has been openly and actively offered for sale in the recent and regular course of business for a reasonably substantial period of time.

(2) any price is the retail, regular, usual, or words of similar import or effect, price for any set of publications in any binding and in combination with any other publication, merchandise or service, unless such price is an actual, bona fide price for which each such publication has been openly and actively offered for sale in the recent and regular course of business for a reasonably substantial period of time.

* * * * * * *

O. [DELETED]
P. [DELETED]

It is further ordered, That the foregoing modifications shall be effective upon service of this Order upon respondents.

Commissioner Baily voted in the negative.

APPENDIX B

This Appendix sets forth the methodology respondents shall employ to determine whether advertisements or promotional materials represent that a person who replies as requested may be contacted directly by a salesperson for the purpose of selling respondents' products, and the criteria for determining whether such advertisements or promotional materials comply with Paragraph II.A.

1. *Format*—Respondents shall test the comprehension level of advertisements or promotional material by conducting a mall-intercept test, using the questionnaire attached hereto as exhibit 1.

2. *Sample Size*—The sample shall consist of at least 150 subjects.

3. *Demographics*—Test subjects must:

a) be between 25 and 49 years of age;

b) have at least one child fifteen years of age or younger living at home;

c) have household incomes of at least $15,000 per year; *provided* that, upon respondents' request, the Division of Enforcement shall increase this figure by increments of $5,000 whenever the percentage of households earning at least the requested amount equals or exceeds the percentage of households that, according to the 1980 United States Census, have household incomes of at least $15,000 per year. The data for future changes shall be based on the most recently published edition of the *Statistical Abstract of the United States.*

4. *Location of Markets*—The interviewing will be conducted in four geographically dispersed markets. The same central location facilities will be used wherever possible. If it is necessary to change any interviewing facility, the new facility shall have demographic characteristics similar to those of the facility it is replacing.

5. *Criteria for acceptability of new coupon copy*—New coupon copy shall comply

with Paragraph II.A if at least seventy-five percent of the test subjects answer "yes" to question 6(b) of the questionnaire (exhibit 1).

Modifications to this Appendix, including the questionnaire, may be made upon a request by respondents and the approval of the Associate Director for Enforcement.

EXHIBIT 1

STUDY: COUPON COMPREHENSION STUDY

MARKETS: Cleveland ( )-1 Boston ( )-3 (9)
New York ( )-2 Kansas City ( )-4

CARD:

INTERVIEWER'S NAME: _____

DATE: _____ TIME INTERVIEW BEGINS: _____

Hello, I'm _____ from _____. Today we are conductir a survey among men and women between the ages of 25 and 49 years of age.

1. Please tell me your approximate age. (READ LIST) (11)

Under 25. . . . . .TERMINATE	40 to 44 years. . . . . .( )-
25 to 29 years. . . . . .( )-1	45 to 49 years. . . . . .( )-
30 to 34 years. . . . . .( )-2	50 years and older. . . . . .TERMIN
35 to 39 years. . . . . .( )-3	Refused . . . . . .TERMIN

2. Do you have any children living at home 15 years of age or younger?

Yes. . . . . .( ) No. . . . . .( ) TERMINATE

3. What are the ages of your children who live at home? (CHECK AS MANY AS APPLY) (12)

16 years or above. . . . . .( )-1
12 years to 15 years . . . . .( )-2
8 years to 11 years. . . . . .( )-3
4 years to 7 years . . . . . .( )-4
3 years or under . . . . . .( )-5

4a. Is your total family income:

$15,000 and above. . . . . .( )
Below $15,000 . . . . .] TERMINATE
Refused. . . . .]

4b. Sex: (13)

Male. . . . . .( )-1 Female. . . . . .( )-2

TAKE RESPONDENT TO A PRIVATE INTERVIEWING AREA IN YOUR CENTRAL LOCATION FACILITY FOR THE BALANCE OF THE INTERVIEW.

(HOLD UP AD IN A MANNER THAT PERMITS RESPONDENT TO SEE IT - COLOR CODED WITH QUESTIONNAIRE - AND SAY:)

"Suppose you saw this ad, and the coupon that was attached to it".

(HAND COUPON CARD - COLOR CODED WITH QUESTIONNAIRE - TO RESPONDENT AND SAY:)

"Now, using your imagination for a moment, assume you want to fill in and return this coupon which would be part of this ad for ENCYCLOPAEDIA BRITANNICA".

"Read this coupon as though you were interested enough to fill it in".

(DO NOT RUSH RESPONDENT. TAKE COUPON CARD FROM RESPONDENT WHEN HE/SHE HAS FINISHED READING.)

BE SURE TEST COUPON CARD AND AD ARE OUT OF SIGHT BEFORE ASKING:

5a. Based on your reading of the coupon, what would you expect to happen if you send in the coupon? (PROBE FULLY AND CLARIFY)

_____ (14) _____

_____ (15) _____

_____ (16) _____

_____ (17) _____

5b. What else would you expect to happen? (PROBE FULLY AND CLARIFY)

_____ (18) _____

_____ (19) _____

_____ (20) _____

_____ (21) _____

5c. Is there anything else you would expect to happen?

_____ (22) _____

_____ (23) _____

_____ (24) _____

_____ (25) _____

"Now, I'd like to ask you a few more questions".

(INTERVIEWER: START AT THE "X" MARKED QUESTION AND PROCEED TO NEXT ONE, AND THEN BACK TO THE FIRST ONE, ETC.)

( ) 6a. Based on your reading of the coupon, would you expect to receive a free booklet, if you send in the coupon? (26)

Yes. . . . . .( )-1
No . . . . . .( )-2
Don't Know . . .(VOLUNTEERED). . . . .( )-3

( ) 6b. Based on your reading of the coupon, would you expect a sales representative for ENCYCLOPAEDIA BRITANNICA to contact you, if you send in the coupon? (27)

Yes. . . . . .( )-1
No . . . . . .( )-2
Don't Know . . .(VOLUNTEERED). . . . .( )-3

( ) 6c. Based on your reading of the coupon, would you expect to get a free book rack, if you send in the coupon? (28)

Yes. . . . . .( )-1
No . . . . . .( )-2
Don't Know . . .(VOLUNTEERED). . . . .( )-3

( ) 6d. Based on your reading of the coupon, would you expect to get a free globe of the world, if you send in the coupon? (29)

Yes. . . . . .( )-1
No . . . . . .( )-2
Don't Know . . .(VOLUNTEERED). . . . .( )-3

IF YES TO Q. 6b

7. If someone sent in the coupon, how likely do you think it would be that a sales representative from ENCYCLOPAEDIA BRITANNICA would contact that person? (READ FIRST FOUR RESPONSES ONLY) (30)

Very Likely. . . . . .( )-1
Fairly Likely. . . . . .( )-2
Not Too Likely . . . . . .( )-3
Not Likely At All. . . . . .( )-4
Don't Know . . .(VOLUNTEERED). . .( )-5

THANK RESPONDENT FOR HIS/HER COOPERATION.

RESPONDENT'S NAME: _____

ADDRESS: _____

CITY/STATE/ZIP: _____

TELEPHONE #: _____ TIME INTERVIEW ENDED: _____
(Area Code)

VALIDATED BY: _____ (31) _____

(32) _____

(33) _____

(34) _____

IN THE MATTER OF

FRED MEYER, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3028. Consent Order, July 23, 1980—Modifying Order, Oct. 14, 1982

This order reopens the proceeding and modifies the Commission's order issued on July 23, 1980 (96 F.T.C. 60), by modifying Paragraphs A and B of Section IV, so as to extend from 10 to 14 days the time in which customers have to come into the store to settle their account once the layaway period has expired. The modification also extends from 11 to 15 days the time the store will wait before returning layaway merchandise to stock.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED JULY 23, 1980

The Federal Trade Commission having considered the July 19, 1982, petition of Fred Meyer, Inc., a Delaware corporation, successor to Fred Meyer, Inc., an Oregon corporation, to reopen this matter and modify the consent order to cease and desist issued by the Commission on July 23, 1980, and having determined that public interest warrants reopening and modification of the order,

It is ordered, That order Paragraph A and B of Section 4 be revised as follows:

A. Mail to each layaway customer:

1. within twenty (20) days after the end of the period designated in the layaway agreement to make full payment for the merchandise,

2. if the payments received by respondent have not been returned to the customer, and

3. if the merchandise has not been delivered to the customer, and

4. before the merchandise is returned to stock and before making any entries in the layaway account which would close out the account, the following disclosure clearly and conspicuously in twelve-point or larger type, entirely on one side of a single piece of paper, separated from any other written matter:

WE OWE YOU MONEY

(Date of mailing to be inserted here)

You haven't fully paid for your recent layaway purchase at our (name of store) store. You can fully pay for your purchase within 14 days from the above date. Or you can get a refund from us for the amount you have paid (less 35 cents handling charge).

If you want a refund, come to the department of the store where you have the layaway not later than (insert date 14 days from notice) and ask for your money. You also have the choice of getting a credit to purchase other merchandise. Please bring this notice with you. If you don't ask for a refund or a credit, we will send you a check automatically within 45 days if the amount we owe you is more than $1.

Respondent may insert in the above notice a different handling charge that is reasonable in comparison with a 35 cent charge.

B. Defer returning layaway merchandise to stock until 15 days after the mailing of the notice specified in IV.A. and allow completion of the layaway purchase within 14 days after the mailing of the notice.

IN THE MATTER OF

BOISE CASCADE CORPORATION

Docket 9133. Interlocutory Order, Oct. 15, 1982

ORDER DIRECTING GENERAL COUNSEL TO COMMENCE COURT ENFORCEMENT OF SUBPOENA DUCES TECUM

On August 10, 1982, the administrative law judge certified to the Commission the request of respondent Boise Cascade Corporation for enforcement of specifications 8, 11–15, 18 and 19 of a subpoena issued by the ALJ on March 1, 1982, to third party Northwest Wholesale Stationers, Inc. Boise is charged in this case with having induced or received discriminatory discounts from office product suppliers in violation of Section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act. Boise resells office supplies at both the wholesale and the retail levels. Northwest is a cooperative that purchases at wholesale from manufacturers and resells to its retail office supply members and to other, nonmember retail office supply outlets. Boise claims to compete with Northwest in its sales to nonmember dealers at wholesale and with Northwest's members in their sales at retail to end users. The subpoena issued by the ALJ pertains to the prices Northwest has paid to its suppliers, as well as the prices it has charged to its members and customers. The information is relevant, Boise argues, to its defense on both the issues of discrimination and injury to competition.

The Commission has consistently held that an ALJ has wide discretion in discovery matters, and his or her determinations should be reversed only for a clear abuse of discretion. *E.g., General Foods Corp.*, 95 F.T.C. 306 (1980); *Warner-Lambert Co.*, 83 F.T.C. 485 (1973). The record of pleadings and orders regarding the issuance and enforcement of the subpoena in issue here demonstrates that the ALJ has in fact carefully and reasonably exercised his authority. The subpoena first requested by Boise was substantially redrafted at his insistence to eliminate unnecessary specifications, narrow the relevant time period for many specifications, and otherwise minimize the burden on Northwest of complying. He thoughtfully considered Northwest's motion to quash and its response to Boise's motion for enforcement. He has issued a protective order that will cover confidential documents produced or made available for inspection by Northwest. There has been no abuse of discretion here. Accordingly,

It is ordered, That the General Counsel shall seek court enforcement of specifications 8, 11–15, 18, and 19 of the subpoena duces

tecum issued to Northwest on March 1, 1982, unless Northwest agrees, within ten days of receipt of this order, to produce the subpoenaed documents at its place of business for inspection and copying by Boise's attorneys.

IN THE MATTER OF

EQUIFAX INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND FAIR CREDIT REPORTING ACTS

Docket 8954. Final Order, Dec. 15, 1980—Modified Order, Oct. 18, 1982

The FTC, in accordance with a decision rendered by the Court of Appeals for the Eleventh Circuit on June 18, 1982, has modified its Final Order In the Matter of Equifax Inc., issued on Dec. 15, 1980 (96 F.T.C. 844). The modified order, effective Oct. 18, 1982, deletes Paragraphs C and D of Part I of the Order, eliminating references concerning the amount of adverse information the company's employees generate about consumers.

MODIFIED ORDER TO CEASE AND DESIST

Respondent having filed in what is now the United States Court of Appeals for the Eleventh Circuit a petition for review of the Commission's cease and desist order issued on December 15, 1980; and the Court having rendered its decision setting aside in part the Commission's order:

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the decision and judgment of the Court of Appeals to read:

I

It is ordered, That respondent Equifax Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the collection, preparation, assembly, sale, or distribution of consumer reports, investigative consumer reports, and files, as "consumer report," "investigative consumer report," and "file" are defined in Section 603(d), (e) and (g) of the Fair Credit Reporting Act (Pub. Law No. 91–508, 15 U.S.C. 1681 *et seq.*) ("the Act") and interpreted in the opinion of the Commission which accompanied the cease and desist order issued on December 15, 1980 (except credit reports prepared by Credit Bureau, Inc. of Georgia, Credit Bureau of Montreal, Ltd., and Credit Marketing Services), shall cease and desist from:

A. Representing, directly or by implication, during the preparation of any report, that investigative personnel employed by Equifax are agents or employees of the company to which the consumer who is the subject of the report has applied for a benefit.

B. Submitting consumer report information to any of its customers who have previously received a consumer report regarding the same consumer, unless: in response to the order of a court having jurisdiction to issue such an order; in accordance with the written instructions of the consumer to whom it relates; or respondent has reason to believe the requester intends to use the information for a permissible purpose as set out in Section 604 of the Act.

C. Including in a consumer report concerning employment at an annual salary of less than $20,000 any notice or other statement that indicates directly or indirectly by means of boilerplate language the existence of items of adverse information, the disclosure of which is prohibited by Section 605 of the Act; *provided, however,* that language notifying the customer of the statutory limitations on the reporting of adverse information may be included in the type of consumer report to which this paragraph applies if it is included in all such reports, regardless of whether a particular consumer's file contains adverse information which the statute prohibits from being reported; and *provided further,* that it is accompanied by an explanation that the notification is included in all reports of the type to which this paragraph applies and is not intended to imply the existence of obsolete adverse information which may not be reported.

D. Misrepresenting to any consumer who requests information concerning himself or herself in respondent's files, the consumer's rights to obtain disclosure by telephone under Section 610 of the Act.

E. Failing:

1. To make available to any consumer who requests information concerning himself or herself in respondent's files, in person or by mail, at the consumer's option, all forms which he or she must execute in connection with the requirements of Section 610 of the Act to receive disclosure to which the consumer is entitled under the Act and this order; and

2. To inform the consumer: that he or she has the right to disclosure upon proper identification, by telephone if he or she pays any toll charge, or in person, at the consumer's option; and what constitutes proper identification.

F. Failing to give disclosure required by Section 609 of the Act to any consumer who has requested disclosure, has provided proper identification as required by respondent under Section 610 of the Act, and has paid or accepted any charges which may be imposed under Section 612 of the Act.

G. Failing, when giving consumers disclosure, to disclose the nature and substance of all information (excluding medical informa-

tion as defined in Section 603(i) of the Act) in its files on the consumer at the time of the request, as required by Section 609 of the Act.

H. Requiring a consumer, as a prerequisite to disclosing information from the consumer's file pursuant to Section 609 of the Act, to fill out or sign a form which authorizes respondent to conduct a reinvestigation of any item the consumer may dispute, or to transmit the results of such reinvestigation to persons to whom it has previously reported the disputed information or which authorizes any business, organization, professional person or anyone else to give full information and records about said consumer to respondent; or interposing any other similar condition or requirement which exceeds those specified in Section 610 of the Act.

I. Failing within a reasonable period of time to reinvestigate any item of information in a consumer's file, the completeness or accuracy of which is disputed by the consumer, unless it has reasonable grounds to believe the dispute is frivolous or irrelevant, as required by Section 611(a) of the Act.

J. Furnishing, directly or indirectly, other than for reports prepared solely for use in the business of insurance, medical information, as defined in Section 603(i) of the Act, obtained in response to a written authorization signed by a consumer, unless the authorization clearly identifies respondent as a recipient of the medical information.

II

It is further ordered, That respondent deliver a copy of this order to all present and future employees who are engaged in the preparation of consumer reports and investigative consumer reports or who are engaged in the disclosure or reinvestigation of information required by the Act.

It is further ordered, That respondent distribute a copy of this order to each of its operating divisions and subsidiaries.

III

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

IV

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

ASSOCIATION OF INDEPENDENT DENTISTS

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3097. Complaint, Oct. 22, 1982—Decision, Oct. 22, 1982

This consent order requires a Colorado dental association to cease, among other things, inhibiting competition by restricting or advising member dentists against the truthful advertising of their services. The order bars the association and its members from coercing any third-party payer into altering the terms and conditions of any dental health care plan. Further, the association must timely repeal any provision of its by-laws which are inconsistent with the prohibitions contained in the order; mail a copy of the order together with a letter specifying the changes made to the by-laws to every member; and provide all future members with a copy of the order.

Appearances

For the Commission: *Steven T. Kessel.*

For the respondent: *Thomas E. Jagger,* Pueblo, Colo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Association of Independent Dentists is a corporation organized and existing under the laws of the State of Colorado, with its mailing address at P.O. Box 1924, Pueblo, Colorado.

PAR. 2. Respondent is an association of dentists practicing in Pueblo County, Colorado, which is organized in order to, among other things, preserve and promote the private dental practices of its individual members. Respondent is not affiliated with any other dental society or professional association.

PAR. 3. Members of respondent are engaged in the business of providing dental services to patients for a fee. Except to the extent that competition has been restrained as herein alleged, members of respondent have been and are now in competition among themselves

and with other dentists. At least some of the fees which respondent's members charge for their services are reimbursed, in whole or in part, by third-party payers which pay for, or administer payment of, dental expenses incurred by their subscribers.

PAR. 4. Respondent engages in substantial activities which further its members' pecuniary interests. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended (15 U.S.C. 44).

PAR. 5. In the conduct of their businesses, members of respondent receive substantial sums of money from third-party payers for rendering dental services, which money flows across state lines, and prescribe medicines or treatment devices which are shipped in interstate commerce. The acts or practices described below are in interstate commerce, or affect the interstate activities of respondent's members, third-party payers, other third parties, and some patients of respondent's members, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)).

PAR. 6. Respondent has restrained competition among dentists in Pueblo County, Colorado by acting as a combination of at least some of its members, or by combining or conspiring with at least some of its members, to:

A. Restrict truthful advertising by respondent's members in their individual dental practices; and

B. Increase or maintain the level of reimbursement paid for dental services by third-party payers.

PAR. 7. Respondent has engaged in various acts and practices in furtherance of this combination or conspiracy, including, among other things:

A. Enacting a by-law prohibiting its members from advertising any aspect of their individual dental practices without prior approval of respondent's Board of Directors;

B. Disciplining members who advertised their individual dental practices without prior approval of respondent's Board of Directors; and

C. Threatening a collective refusal by its members to execute "participating dentist agreements" with a third-party payer for dental services in order to force that third-party payer to increase the levels of reimbursement for dental services rendered to its subscribers.

PAR. 8. The combination or conspiracy and the acts and practices described above have restrained, frustrated and foreclosed competition among dentists practicing in Pueblo County, Colorado, in the following respects:

A. Members of respondent have agreed not to, and do not, compete with each other by advertising the price, quality or convenience of their individual dental practices, and advertising by some individual members of respondent has been restrained; and

B. Members of respondent have agreed not to compete by independently deciding whether, and on what terms, to deal with third-party payers for dental services, and have agreed instead to deal with such third-party payers on a concerted basis, in order to increase the fees which respondent's members receive for their services.

PAR. 9. The combination or conspiracy and the acts or practices described above have deprived consumers of the benefits of competition among dentists. In particular, consumers have been deprived of information which can be obtained through truthful advertising concerning the price, quality, and convenience of respondent's members' dental practices, and have been deprived of the benefits of efforts by third-party payers to contain or limit the costs of dental services to their subscribers in Pueblo County, Colorado.

PAR. 10. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition or unfair or deceptive acts or practices which violate Section 5 of the Federal Trade Commission Act. Such combination or conspiracy is continuing and will continue absent the entry against respondent of appropriate relief.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent, Association of Independent Dentists, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the draft complaint, a statement that the signing of that

agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in the draft of complaint, and waivers and other provisions as required by the Commission's Rules; and

The Federal Trade Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent, Association of Independent Dentists, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its mailing address at P.O. Box 1924, Pueblo, Colorado.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

For purposes of this order, the following definitions shall apply:

A. *AID* means respondent Association of Independent Dentists, its directors, officers, committees, agents, employees, successors and assigns;

B. *Third-party payer* means any person, partnership, corporation, government agency or other entity which agrees to pay for or reimburse, or administer payment or reimbursement of, all or part of any expense for dental services incurred by another person or group of persons;

C. *Reimbursement* means money paid by a third-party payer for dental services.

II.

It is ordered, That AID shall cease and desist from:

A. Restricting, regulating, interfering with, or advising against the advertising or publishing by any person or organization of

information about dental services offered by that person or organization, or the manner in which such information is advertised or published; or

B. Making any express or implied threat of acts to be taken by AID or by any AID members acting in concert with AID, or engaging in any other acts, with the purpose or effect of coercing, compelling, or inducing any third-party payer to accept a position taken by AID, or AID members acting in concert with AID, concerning the amount, manner of calculating, or terms of reimbursement.

III.

It is further ordered, That AID shall:

A. Within thirty (30) days after service upon AID of this order, repeal any provision of its by-laws which is inconsistent with the provisions of Part II of this order;

B. Within forty (40) days after service upon AID of this order, mail a copy of this order, and a letter specifying the changes to AID by-laws made pursuant to Paragraph A of this Part, to every AID member;

C. Within sixty (60) days after service upon AID of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which AID has complied with this order; and

D. Provide a copy of this order to each new AID member when the member is accepted into membership.

IV.

It is further ordered, That AID shall notify the Commission at least thirty (30) days prior to any proposed change in AID such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

IN THE MATTER OF

H & R BLOCK, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2162. Consent Order, March 1, 1972—Modifying Order, Nov. 2, 1982

This order reopens the proceeding and modifies Paragraphs 5 and 6 of the Commission's order issued on March 1, 1972 (80 F.T.C. 304), by substituting a new paragraph 5, so as to make the order's provisions consistent with federal tax laws. Section 7216 of the Internal Revenue Code provides a comprehensive scheme for regulating the use by tax preparers of information obtained from customers, and the Commission believes that this scheme is adequate to prevent the misuse of confidential information by petitioner in the future.

ORDER REOPENING THE PROCEEDING AND GRANTING REQUEST TO MODIFY ORDER

On January 22, 1982, H & R Block Inc., the petitioner, filed a Request to Reopen Proceedings under Section 2.51 of the Commission's Rules of Practice. Block sought to set aside paragraphs 5 and 6 of a March 1, 1972, order against the company. On June 8, 1982, Block filed a Supplement to Modification of Request to Reopen Proceedings, seeking modification of the Order paragraphs instead of their elimination. The Order paragraphs prohibit Block from using information obtained from a customer for any purpose other than the preparation of tax returns unless, prior to obtaining any information from the customer, Block obtains the customer's written consent. The consent form used must disclose: (1) the exact information to be used, (2) the particular use to be made of such information, (3) and a description of the parties or entities to whom the information may be made available.

The petitioner contends that enactment of Section 7216 of the Internal Revenue Code, 26 U.S.C. 7216, on December 10, 1971, effective January 1, 1972, and adoption by the Internal Revenue Service of regulations 301.7216–1 through 301.7216–3 on March 24, 1974, constitute a change of the law warranting reopening the proceeding and modifying paragraphs 5 and 6 of the Commission's Order. Regulation 301.7216–3 reads in pertinent parts:

Disclosure or use only with formal consent of taxpayer.— (a) Written consent to use or disclosure—(1) Solicitation of other business. (i) If a tax return preparer has obtained from the taxpayer a consent described in paragraph (b) of this section, he may use the tax return information of such taxpayer to solicit from the taxpayer any additional current business, in matters not related to the Internal Revenue Service, which the

tax return preparer provides and offers to the public. The request for such consent may not be made later than the time the taxpayer receives his completed tax return from the tax return preparer. If the request is not granted, no follow up request may be made. This authorization to use tax return information of the taxpayer does not apply, however, for purposes of facilitating the solicitation of the taxpayer's use of any services or facilities furnished by a person other than the tax return preparer, unless such other person and the tax return preparer are members of the same affiliated group within the meaning of section 1504. Thus, for example, the authorization would not apply if the person is a corporation which is owned or controlled directly or indirectly by the same interests which own or control the tax return preparer but which is not affiliated with the tax return preparer within the meaning of section 1504(a). Moreover, this authorization does not apply for purposes of facilitating the solicitation of additional business to be furnished at some indefinite time in the future, as, for example, the future sale of mutual fund shares or life insurance, or the furnishing of future credit card services. It is not necessary, however, that the additional business be furnished in the same locality in which the tax return information is furnished.

* * * * * * *

(2) Permissible disclosures to third parties. If a tax return preparer has obtained from a taxpayer a consent described in paragraph (b) of this section, he may disclose the tax return information of such taxpayer to such third persons as the taxpayer may direct. However, see § 301.7216–2 for certain permissible disclosures without formal written consent.

* * * * * * *

(b) Form of consent. A separate written consent, signed by the taxpayer or his duly authorized agent or fiduciary, must be obtained for each separate use or disclosure authorized in paragraph (a)(1), (2), or (3) of this section and shall contain—

(1) The name of the tax return preparer,

(2) The name of the taxpayer,

(3) The purpose for which the consent is being furnished,

(4) The date on which such consent is signed,

(5) A statement that the tax return information may not be disclosed or used by the tax return preparer for any purpose (not otherwise permitted under § 301.7216–2) other than that stated in the consent, and

(6) A statement by the taxpayer, or his agent or fiduciary, that he consents to the disclosure or use of such information for the purpose described in subparagraph (3) of this paragraph.

The Commission has considered these developments and concluded that the public interest warrants its reopening the proceeding and modifying the order substantially as requested by petitioner. Section 7216 of the Code and the regulations promulgated thereunder constitute a comprehensive scheme for regulating the use by tax preparers of information obtained from customers. The Commission believes that this scheme is adequate to prevent the misuse of confidential information by petitioner in the future. The additional requirements of the Commission's Order, which mandate more

disclosures and require that consent be obtained earlier from the customer, are not inconsistent with the regulatory scheme. However, they do impose an additional burden on respondent that the Commission has concluded is unnecessary. Accordingly,

It is ordered, That paragraphs 5 and 6 of the Order be modified by the substitution of the following new paragraph:

5. Using or disclosing any information concerning any customer of respondent, including the name and address of the customer, obtained as a result of the preparation of the customer's tax return, for any purpose which is not essential or necessary to the preparation of said tax return, except as specifically authorized by Section 7216 of the Internal Revenue Code and the regulations promulgated thereunder or by future amendments thereto.

IN THE MATTER OF

U.S. PIONEER ELECTRONICS CORP.

Docket C-2755. Interlocutory Order, Etc., Nov. 5, 1982

REOPENING OF ORDER AND ORDER TO SHOW CAUSE

By petition of June 30, 1982, respondent U.S. Pioneer Electronics Corp. ("Pioneer") requests that Paragraph I(11) of the Commission's order issued against Pioneer on October 24, 1975 be modified so that the order would no longer prohibit Pioneer from restricting transshipment by sellers of its products. Pursuant to Section 2.51 of the Commission's Rules of Practice the petition was placed on the public record for comment.

Upon consideration of Pioneer's petition and supporting materials and the public comments, the Commission now finds that Pioneer would likely suffer significant competitive injury unless the order is modified. However, the Commission also finds that a limited prohibition of transshipment restrictions is necessary to ensure that the order's principal purpose, the encouragement of resale price competition in relevant Pioneer products, is achieved. Therefore, *it is ordered* that the order in this matter be reopened; that Pioneer's petition to delete Paragraph I(11) of the order is denied; and pursuant to Section 3.72(b) of the Commission's Rules of Practice, that on or before the thirtieth (30) day after service of this Order to Show Cause upon it, the Respondent may show cause, if any there be, why the public interest does not require the Commission to modify Paragraph I(11) of the order in this matter so that it will read as follows:

Preventing or prohibiting any independent dealer or distributor from reselling his products to any person or group of persons, business or class of businesses, except as expressly provided herein. This order shall not prohibit respondent from establishing lawful, reasonable, and non-discriminatory minimum standards for its dealers, including standards that relate to promotion and store display, demonstration, inventory levels, service and repair, volume requirements and financial stability nor shall this order prohibit respondent from requiring its dealers who sell respondent's products for resale to make such sales only to dealers who maintain such minimum standards.

SEPARATE STATEMENT OF COMMISSIONER CLANTON, IN WHICH CHAIRMAN MILLER CONCURS

The Commission today has issued an Order requiring U.S. Pioneer to show cause why its 1975 consent decree should not be modified to ban Pioneer from restricting transshipments to retailers who meet certain yet-to-be-established criteria. I would have preferred to grant Pioneer's petition in its entirety. I have noted for the Order only because a contrary vote would have deadlocked the Commission, leaving the original consent decree in effect and affording Pioneer no relief at all.

The original consent decree prohibited Pioneer from placing any restriction on transshipments, as an ancillary measure designed to reinforce other provisions prohibiting resale price maintenance. [1] Pioneer's affidavits clearly demonstrate that transshipments are frequently made to retailers who fail to provide adequate promotion and support services (a highly important aspect of stereo component marketing), and that this undermines the efforts of authorized dealers who do provide those services. Indeed, the Commission and its Bureaus of Competition and Economics agree that the "free rider" problem in this case is significant. Even more important, Pioneer's affidavits have also demonstrated the existence of considerable price competition among its authorized dealers. A survey of advertisements of authorized Pioneer dealers (including those who will apparently remain as dealers under Pioneer's proposed modification of its distribution system) shows, for example, a Pioneer receiver advertised at prices from $96 to $199, and a Pioneer tape deck advertised between $139 and $189—in each case, a range well below the suggested list price of that item.

In short, Pioneer has clearly carried its burden of demonstrating both the existence of serious free rider problems and the presence of vigorous price competition. I am unclear as to what additional evidence my fellow Commissioners would require.

To be sure, the Commission's decision today does permit Pioneer to establish reasonable, objective criteria for dealer services, and to ban transshipments to dealers who do not meet those criteria. However, this represents a much more instrusive or "regulatory" remedy than we customarily adopt, and in my view it should be confined to cases where there is a clear need for it. The difficulties of drawing up such criteria are obvious (to say nothing of the difficulties in enforcing them), and we have heretofore been very cautious in adopting

[1] The provisions prohibiting resale price maintenance were not challenged by Pioneer's petition and will remain in effect.

analogous remedies even in litigated cases where the Commission found an antitrust violation.[2] In this case, by contrast, there is no evidence suggesting that this remedy is necessary (or would even be of any use) to supplement the Order's provisions banning resale price maintenance. As indicated above, all the available evidence indicates that retail prices have become extremely competitive in the seven years the Order has been in effect. There is absolutely no evidence of any noncompliance with the ban on resale price maintenance (or with any other provision of the Order), and no evidence that that ban cannot continue to be enforced without restricting Pioneer's control over transshipments.

Thus, I am voting for this Order with extreme reluctance, and do so only because it represents the lesser of two evils. In my view, a far better course would have been to grant Pioneer's petition in its entirety.

SEPARATE STATEMENT OF COMMISSIONER PERTSCHUK REGARDING U.S. PIONEER PETITION

Pioneer petitioned to be relieved totally from a Commission order provision which prohibits it from restricting its dealers' ability to transship audio components to other retail distributors. This provision was included in a 1975 order in response to Pioneer's alleged resale price-fixing activities. The rationale of the provision was to prohibit Pioneer from continuing to prohibit transshipping in order to further its resale price-fixing scheme and to provide a means for restoring intraband competition in Pioneer products.

Pioneer has made a showing that it has suffered a decline in market share in recent years and that there is some discounting by Pioneer dealers. On the other hand, there is no real proof that Pioneer's declining market share is the result of transshipping and, in fact, some commenters argued otherwise. Moreover, while there has been discounting of Pioneer products, Pioneer is planning to reorganize substantially its distribution system and to terminate a large number of dealers, including many who are clearly discounters.

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[2] *See Onkyo U.S.A. Corp.*, 100 F.T.C. 59, Docket No. C-3092 (Aug. 24, 1982), where we issued an Order prohibiting resale price maintenance without any restriction on the respondent's control over transshipments, and *Lenox, Inc.*, 100 F.T.C. 259, Docket No. C-8718 (July 12, 1982), where we recently modified an Order to eliminate a ban on restricting transshipments without requiring the manufacturer to set up any objective criteria for transshippees. Even after finding unlawful resale price maintenance in *Russell Stover Candies, Inc.*, 100 F.T.C. 1, Docket No. 9140 (July 1, 1982), the Commission did not attempt to set objective criteria and require the manufacturer to permit sales or transshipments to all retailers who met those criteria. The Commission did incorporate an "objective criteria" requirement into its modification of a consent order in *James B. Lansing Sound, Inc.*, 97 F.T.C. 914, Docket No. C–1785 (May 20, 1981) but in that case this was the modification specifically requested by the respondent's petition.

Under these circumstances, the Bureau of Competition has recommended that Pioneer's order be modified to allow it to set reasonable non-discriminatory criteria on transhippees, but not to prohibit totally its dealers from selling to other retailers. In view of the uncertainty about the future of intraband competition for Pioneer products, I believe this more limited modification is appropriate. It will allow Pioneer to prevent identifiable classes of retailers from dealing in its products while retaining some additional spur to intraband competition.[1]

SEPARATE STATEMENT OF COMMISSIONER BAILEY

I have voted to grant partial relief to petitioner Pioneer Electronics in order to permit some control over product transshipments, as long as the standards proscribing such transshipments are reasonable and consistent with the order's main prohibition against resale price maintenance.

The Supreme Court's decision in *Continental TV Inc. v. GTE Sylvania,* 433 U.S. 36 (1977), sets out analytic principles for non-price vertical restraints that petitioner urges should be taken into account in analysis of the petition. But I also believe that a petitioner must demonstrate that a competitive injury results from the order's current operation, or that the provision in question is unnecessary to achieve the relief that was the main thrust of the order. It is in regard to a colorable demonstration of competitive injury that I believe petitioner Pioneer has succeeded where others have failed. The limited relief granted should be sufficient to correct the competitive "free rider" harms set out by Pioneer, and Pioneer has acknowledged that some of their objections to the order are met by this approach.

I did not agree, however, that the petition should be granted outright. I believe there is a continued need to assure that resale price maintenance is prevented. My caution in approaching the petition was influenced by petitioner's alteration of its distribution system following a corporate leadership reorganization, as a consequence of which at least one major class of discounters was dropped as dealers. In this regard, I took into account the public record comments of representatives of this grouping. The facts peculiar to each petition most often determine the outcome, at least to my view.

[1] A similar order modification was made in *James B. Lansing Sound, Inc.*, 97 F.T.C. 914, Docket No. C-1785, but there the modification was requested by the petitioner. In *Lenox, Inc.*, 100 F.T.C. 259, Docket No. 8718, where a restriction on transshipping bans was eliminated, the record showed discounting by Lenox dealers with no imminent termination of discounting dealers. In *Russell Stover*, 100 F.T.C. 1, Docket No. 9140, the order does not prohibit restrictions on transshipments, but that resale price maintenance scheme was based on agreements, the legal basis of which were disputed in good faith by the respondent.

As we see more and more petitions seeking release from FTC orders, I continue to believe that strict standards should be applied to these requests. If a strong showing of need to reopen an order is not presented, I tend to endorse the presumptions of finality and repose that accompany a final FTC order resolving a legal dispute. Otherwise the credibility of FTC orders will be called into question.

IN THE MATTER OF

HERCULES INCORPORATED

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket C-1794. Consent Order, Sept. 23, 1970—Modifying Order, Nov. 8, 1982

This order reopens the proceeding and modifies the Commission's order issued on Sept. 23, 1970 (77 F.T.C. 1242); *modified* April 8, 1982 (99 F.T.C. 404), by deleting Paragraphs II, V and VII from the order. The deletion of these Paragraphs allows the company to acquire stocks, share capital or assets of Columbian Rope Company without prior Commission approval, and repeals provisions requiring the company to notify the Commission of any change in the corporate respondent or furnish compliance reports upon request.

ORDER REOPENING PROCEEDING AND MODIFYING ORDER

By petition filed June 24, 1982, respondent Hercules Incorporated ("Hercules") requests, pursuant to Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), that Paragraph II of the Commission's order issued in this matter on September 23, 1970, be modified so that Hercules no longer requires the Commission's prior approval to acquire, directly or indirectly, the whole or any part of the stock, share capital or assets of Columbian Rope Company. Hercules also sought to delete the other order provisions binding Hercules, Paragraph VII, which requires notice of changes in corporate organization and Paragraph V, which requires compliance reports when requested by the Commission.

Pursuant to Section 2.51 of the Commission's Rules of Practice and Procedure, the petition was placed on the public record for thirty days. No comments were received.

The Commission has determined that order provisions requiring prior Commission approval of future acquisitions generally should not have terms exceeding ten years. In most cases, the Commission believes that such prior approval provisions will have served their remedial and deterrent purposes after ten years and that the findings upon which such provisions are based should not be presumed to continue to exist for a longer period of time. The Commission has reviewed respondent's petition as well as supplemental information and has concluded that the order has served its law enforcement and remedial goals.

Therefore, upon consideration of the petition and its supporting materials the Commission, in the exercise of its discretion, finds that elimination of Paragraphs II, V, and VII is in the public interest.

Accordingly, *it is ordered,* that the proceeding be, and it hereby is, reopened for the purpose of modifying the order entered therein;

It is further ordered, That the Paragraphs II, V, and VII shall terminate upon service of this order.

IN THE MATTER OF

DAIRYMEN, INC., ET AL.

Docket 9143. Interlocutory Order, Nov. 10, 1982

ORDER GRANTING RESPONDENT MUNFORD, INC.'S MOTION TO DISMISS

On July 31, 1980, the Commission issued a complaint against Dairymen, Inc., and Munford, Inc. The complaint alleged that Dairymen's acquisition in 1978 of Munford's wholly owned subsidiary, Farmbest Foods, Inc., may have substantially lessened competition or tended to create a monopoly in the processing and sale of fluid milk in relevant sections of the country, in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. On August 23, 1982, respondent Munford moved for an order dismissing the complaint as to it. In support of its motion, Munford offered a stipulation entered into by it and complaint counsel agreeing, *inter alia,* that Munford "is no longer needed for purposes of fashioning effective relief, if any, in this matter, or for any other purpose, as the course of discovery to date has demonstrated that Munford is not a suitable candidate for imposition of the remedy of rescission or for the re-purchase of the stock of Farmbest Foods, Inc." After hearing argument from Munford's counsel in support of the motion and argument in opposition thereto by counsel for respondent Dairymen, the ALJ on August 24 certified the motion to the Commission without any recommendation as to its disposition.[1] Respondent Dairymen filed an opposition to the motion with the Commission on September 3.

Dairymen argues that the motion should be denied because: (1) "Munford, as the seller of Farmbest, was so closely connected to the acquisition herein complained of that it has become a necessary and indispensable party" (Opposition at p. 7); (2) "neither Munford nor complaint counsel have proffered any evidence or justification to support the conclusory statement that Munford is not a suitable candidate for the remedy of rescission" (Opposition at p. 6); and (3)

[1] At the August 24 hearing, the ALJ did not take a position on the merits of Munford's motion, explaining that it was beyond his authority to grant it. He concluded that he would "sign the stipulation, sign the order and let the Commission decide * * *." (Transcript of August 24, 1982, hearing, p. 228.) However, he then issued an order prepared by Munford purporting to "grant" the motion and certify it for Commision action. In light of the limited discussion of the motion at the hearing, the lack of briefing before the ALJ, and the absence of any analysis of the issues in his order, we do not take the order to constitute a recommendation.

complaint counsel's support of Munford's motion is inconsistent with their apparent intent to oppose Munford's failing company defense [2] and with earlier statements concerning rescission as a possible remedy in the case.

Dairymen has made no argument that this case is uniquely suited to consideration of rescission as a remedy, should the Commission find that a violation occurred. Rather, it has relied simply on cases holding that a seller may properly be the subject of a rescission order by a court under Section 15 of the Clayton Act. However, it is one thing to argue from those cases that the Commission may order, in appropriate circumstances, that a transaction in violation of Section 7 and Section 5 be rescinded (a proposition with which we agree); and it is quite another to suggest that the Commission *must* retain as a respondent the seller in such alleged transactions so as to preserve rescission as a possible form of relief.

We cannot accept Dairymen's argument that it would be prejudiced by dismissal of the complaint as to Munford—or its implicit assertion that it has a right to insist that Munford be retained as a respondent. It is well within the discretion of the Commission to forego consideration of rescission as a remedy in this case and grant Munford's motion.

We would prefer to have been informed by Munford and complaint counsel as to the basis for their agreement that Munford is not a "suitable candidate" for rescission. However it is not essential to a decision on Munford's motion. It is clear that complaint counsel do not intend to establish the record necessary to support a rescission order. That being the case, it is not in the public interest to retain Munford as a party; indeed, to do so would unreasonably burden that company.

We do not agree that complaint counsel have taken "inherently inconsistent positions" in supporting Munford's motion and opposing Dairymen's failing company defense. Different legal standards apply to the two issues, and they pertain to Munford's financial condition in different time periods. We also reject Dairymen's contention that complaint counsel's support for Munford's motion confuses the issues in the proceeding and handicaps Dairymen in its defense. Although complaint counsel did state in 1980 that they wanted to preserve "the option of considering rescission as a possible sanction in this matter" (Transcript of October 24, 1980, hearing, p. 18), it is

[2] On September 8, 1982, the ALJ granted Dairymen's motion for permission to amend its answer to assert that Munford was a failing company prior to and at the time of the sale of Farmbest. Complaint counsel had opposed the motion.

understandable that their position could change after two years of discovery.

It is ordered, That the complaint is dismissed as to respondent Munford, Inc.

Chairmen Miller did not participate.

IN THE MATTER OF

TEXAS DENTAL ASSOCIATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9139. Complaint, June 17, 1980—Decision, Nov. 19, 1982

This consent order requires a Texas dental association to cease, among other things, inhibiting competition by inducing its members to withhold x-rays and other diagnostic information from third-party payers and independent dental consultants for use in reviewing claims and establishing cost containment programs. The association is barred from coercing independent dental consultants and third-party payers into altering the terms and conditions of any dental health care plan, and from compelling third-party payers to select a particular independent dental consultant. Further, previous agreements entered into by the association and dental insurers which do not conform to the terms of the order are not binding upon the signatories. The association is also required to mail a copy of the order together with a letter explaining its provisions to all its members and to any person who joins the association within the next four years.

Appearances

For the Commission: *Julian V. Buenger, Steven L. Page* and *Edward C. Johnson.*

For the respondent: *Robert A. Hall* and *Roger A. Wright, Jr., Woodard, Hall & Primm,* Houston, Tex.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondent named in the caption hereof has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. The following definition shall apply in this Complaint: *Third-party payer* or *payer* means any entity that provides a program of reimbursement for dental health care services to employees or members of any business organization, and any person, such as an independent claims adjuster, who provides

evaluative services in connection with any such reimbursement program.

PAR. 2. Respondent Texas Dental Association ("TDA") is a Texas corporation with its principal place of business at 420 North Interregional Highway, Austin, Texas. TDA has approximately 5500 members, all of whom are either licensed to practice dentistry in Texas, or students of dentistry. TDA charters approximately twenty-four regional component societies.

PAR. 3. Members of respondent are engaged in the business of providing dental health care services to patients for a fee and are paid for such services from the patients' personal funds and/or from funds provided under dental health care benefits programs. Except to the extent that competition has been restrained as herein alleged, members of respondent have been and are now in competition among themselves and with other dentists.

PAR. 4. In 1976, total expenditures for dental health care services in the United States were approximately $8.6 billion. Annual expenditures for dental health care services in Texas are at least $100 million.

PAR. 5. The acts and practices of respondent and its members are in or affect interstate commerce and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 6. A significant portion of the population of Texas is covered by dental health care benefits programs administered by third-party payers. Many of such programs provide for determination of benefits in advance of treatment ("predetermination"), limit coverage to the adequate, but not necessarily the most expensive, course of treatment, and require that radiographs ("X-rays") be submitted to aid in benefit determinations. The purpose of such provisions is to contain the costs of dental care. Their efficient utilization requires cooperation from treating dentists.

PAR. 7. Respondent, constituting a combination of its members, and respondent, in combination with certain of its members and others, has combined, conspired, and engaged in acts, practices and methods of competition which eliminate, prevent, or hinder competition among dentists with respect to furnishing X-rays to third-party payers, participating in alternate course of treatment and pretreatment determination programs, and cooperating with third-party payers in claims review and cost containment programs.

PAR. 8. In the course of the conduct alleged in Paragraph Seven, respondents have, among other things:

(A) Encouraged and induced members to refuse to submit X-rays to third-party payers and to refuse to provide other professional services for use by payers in benefit determination;

(B) Conducted meetings and pledge card campaigns and promulgated, adopted, published, and distributed statements of policies and practices regarding the terms and conditions upon which members are encouraged to deal with third-party payers; and

(C) Insisted that payers execute Memoranda of Understanding imposing particular procedures by which TDA members deal with payers, including requiring payers to agree to submit disputes to respondent's designated consultants and peer review committees.

PAR. 9. The actual and potential effects of the acts, practices and methods of competition alleged in Paragraphs Seven and Eight, include the following, among others:

(A) Competition among dentists in Texas has been hindered, restrained, and frustrated;

(B) Competition among third-party payers regarding claims review programs has been hindered, restrained, and frustrated;

(C) Consumers have been deprived of the benefits of third-party payers' cost-containment measures, including lower or potentially lower costs for dental health care and dental health care benefits insurance.

PAR. 10. The aforesaid acts and practices constitute unfair methods of competition and unfair acts or practices by respondent in violation of Section 5 of the Federal Trade Commission Act, and are within the scope of Section 5 of said Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in

such complaint, and waivers and other provisions as required by the Commission's rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in section 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Texas Dental Association is a not-for-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its office and principal place of business located at 1946 S. Interregional Highway, in the City of Austin, State of Texas.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I

It is ordered, That for the purposes of this order the following definitions shall apply:

A. *TDA* means Texas Dental Association, its House of Delegates, councils, committees, officers, representatives, agents, employees, successors and assigns.

B. *Third-party payer* or *payer* means any person, corporation or other entity who or which administers or provides a risk-sharing reimbursement plan or a program of reimbursement, directly or indirectly, for all or part of any expense for dental health care services incurred by any person.

C. *Independent dental consultant* means a dentist who, acting either in an individual or corporate capacity, is employed by or contracts with a third-party payer to:

1) furnish evaluative services from a review of diagnostic information or dental claims forms; or

2) advise or deal with other dentists or third-party payers

regarding courses of dental treatment, appropriate fee reimbursements, or benefit determinations under any dental reimbursement plan or program.

D. *Evaluative services* means the review or rendering of opinions or determinations from diagnostic information or reports of attending dentists or from other sources, regarding courses of treatment, appropriate manner of reimbursement, or extent of benefit coverage, under any dental reimbursement plan or program.

II

It is further ordered, That TDA, directly or through any subsidiary, division or other device, shall not engage in any act or practice which has the purpose or effect of:

A. Requiring, advocating, advising, requesting, or suggesting that any of its members: (1) submit or refuse to submit radiographs or other diagnostic information or other materials to any third-party payer or to any independent dental consultant designated by such third-party payers; or (2) refuse to deal with any third-party payer or independent dental consultant except on certain terms or under certain conditions;

B. Compelling, threatening, or coercing any third-party payer or independent dental consultant to alter any provision of, or means of administering, any dental health care coverage plan;

C. Compelling, threatening, or coercing any third-party payer or independent dental consultant to enter into agreements with TDA or others regarding the terms of any dental health care coverage plan or the methods by which any third-party payer or independent dental consultant makes determinations about dental insurance claims; or

D. Compelling, threatening, or coercing any third-party payer to select a particular independent dental consultant.

Provided, however, That nothing contained herein shall be deemed to prohibit individual members of TDA, acting individually, from dealing with third-party payers in such manner as they determine is in the best interest of their patients.

III

It is further ordered, That any "Memorandum of Understanding" or agreement between TDA or its members and any third-party payer providing for the circumstances under which radiographs or

other diagnostic information is to be furnished to third-party payers or independent dental consultants or providing in any manner for the way in which determinations about dental insurance claims are to be made is non-binding on TDA, its members and third-party payers.

IV

It is further ordered, That within thirty (30) days after this order becomes final, TDA shall mail to each of its members a copy of the Commission's complaint and order in this matter, as well as a letter in the form shown as "Attachment A" to this order. In addition to the foregoing, TDA shall mail a copy of the aforementioned complaint, order, and letter to every person who joins TDA within four (4) years of the date of service of this order. Such mailing shall occur within thirty (30) days after a person becomes a member of TDA.

V

It is further ordered, That within sixty (60) days after service of this order and again one (1) year thereafter, TDA shall file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied and intends to comply with this order.

VI

It is further ordered, That TDA shall notify the Commission at least thirty (30) days prior to any proposed change in it, such as dissolution, assignment or sale resulting in the emergence of a successor association or corporation, or any other change in the association or corporation which may affect compliance obligations arising out of this order.

ATTACHMENT A

(Respondent's Letterhead)

Dear Doctor:

As you may be aware, the Federal Trade Commission (FTC) has issued a complaint against the Texas Dental Association (TDA). TDA has denied the allegations of the complaint and continues to deny that it has engaged in any unlawful conduct. Nevertheless, TDA has voluntarily entered into an agreement with the FTC which has resulted in the entry of a consent order on _____which requires, in essence,

that TDA not engage in certain activities that are concerned with dental health care benefits programs. This order also requires that you be sent a copy of the complaint and order and this letter.

In accordance with the terms of the FTC's order, you are hereby notified that TDA shall not engage in any act or practice which has the purpose or effect of: (1) requiring, advocating, advising, requesting, or suggesting that any of its members submit or refuse to submit radiographic or other diagnostic information or other materials to any third-party payer or independent dental consultant or refuse to deal with any third-party payer or independent dental consultant except on certain terms or under certain conditions; (2) compelling, threatening, or coercing any third-party payer or independent dental consultant to alter any provision of, or means of administering, any dental health care coverage plan; (3) compelling, threatening, or coercing any third-party payer or independent dental consultant to enter into agreements with TDA or others regarding the terms of any dental health care coverage plan or the methods by which any third-party payer or independent dental consultant makes determinations about dental insurance claims; or (4) compelling, threatening, or coercing any third-party payer to select a particular dental consultant.

Additionally, the order also provides that Memoranda of Understanding or other agreements between TDA or its members and any third-party payer providing for the circumstances under which radiographic or other diagnostic information is to be furnished to third-party payers or providing in any manner for the way in which determinations about dental insurance claims are to be made are non-binding on TDA, its members and third-party payers. The order does not prohibit the use of the guidelines contained in such Memoranda of Understanding for the resolution of a dispute concerning dental insurance claims if the individual parties to a dispute in the future voluntarily wish to use them.

TDA adheres to the view that the primary goal of its members is to render to the public the best dental service of which they are capable. Nothing in this order changes or affects that goal. You remain free to deal individually with third-party payers and programs in such manner as you decide individually is best for your patients.

Copies of the FTC's complaint and order are enclosed. This letter has attempted to summarize the important parts of the order but you should read it carefully in its entirety.

Very truly yours,

/s/ O.V. Cartwright

IN THE MATTER OF

GERMAINE MONTEIL COSMETIQUES CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3098. Complaint, Nov. 19, 1982—Decision, Nov. 19, 1982

This consent order requires a New York City cosmetic manufacturer and seller to cease, among other things, attempting to fix and maintain the resale prices at which its products are advertised or sold, through coercion or otherwise. The firm is also prohibited from withholding any earned advertising credit or benefit from recalcitrant dealers; restricting the lawful use of its trademarks or brandnames; and seeking the identity of dealers who deviate from suggested resale prices. Additionally, for a two year period, the order precludes the dissemination of suggested resale prices unless accompanied by a statement advising that such prices are merely suggested; and requires the firm to mail a letter describing the provisions of the order to all present and future accounts.

Appearances

For the Commission: *Jeffrey Klurfeld* and *Ralph Stone.*

For the respondent: *Stuart L. Friedel, Davis & Gilbert,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Germaine Monteil Cosmetiques Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

For purposes of this complaint, the following definitions shall apply:

A. *Product*

Product is defined as any item of cosmetic, fragrance or soap, any accessory containing any item of cosmetic, fragrance or soap, or any related accessory, including but not limited to, any applicator or brush, which is manufactured, offered for sale or sold by respondent.

In addition to the foregoing, *product* is defined to include any item

which is manufactured, offered for sale or sold by respondent for resale to consumers together with any *product* as defined hereinabove.

B. *Dealer*

Dealer is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

C. *Resale Price*

Resale Price is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any suggested, established or customary resale price as well as the retail price in effect at any dealer.

PARAGRAPH 1. Respondent Germaine Monteil Cosmetiques Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 40 West 57th Street, New York, New York.

PAR. 2. Respondent is now, and for some time last past, has been engaged in the manufacture, advertising, offering for sale, sale and distribution of cosmetics, fragrances, soaps and related accessories.

PAR. 3. Respondent maintains, and has maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. Respondent sells and distributes its products directly to retail dealers located throughout the United States who resell respondent's products to the general public.

PAR. 5. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the manufacture, advertising, offering for sale, sale or distribution of merchandise of the same general kind and nature as merchandise manufactured, advertised, offered for sale, sold or distributed by respondent.

PAR. 6. In the course and conduct of its business as above described, respondent has for some time last past effectuated and pursued a policy throughout the United States to establish and maintain the resale prices at which certain of its dealers advertise, offer for sale and sell its products.

PAR. 7. By various means and methods, respondent, in combination, agreement and understanding with certain of its dealers, and

with the acquiescence of other of its dealers, has established, maintained and pursued a planned course of action to establish and maintain certain specified uniform prices at which said products will be resold.

PAR. 8. The aforesaid acts and practices of respondent have been and are now having the effect of hampering and restraining competition in the resale and distribution of said products, and, thus, are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Commissioner Bailey dissented.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Germaine Monteil Cosmetiques Corporation is a corporation organized, existing and doing business under and by

virtue of the laws of the State of Delaware, with its office and principal place of business located at 40 West 57th Street, in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For the purposes of this Order, the following definitions and order coverage shall apply:

A. *Product*

Product is defined as any item of cosmetic, fragrance or soap, any accessory containing any item of cosmetic, fragrance or soap, or any related accessory, including but not limited to any applicator or brush, which is manufactured, offered for sale or sold by respondent.

In addition to the foregoing, *product* is defined to include any item which is manufactured, offered for sale or sold by respondent for resale to consumers together with any *product* as defined hereinabove.

B. *Dealer*

Dealer is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

C. *Resale Price*

Resale Price is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any suggested, established or customary resale price as well as the retail price in effect at any dealer.

D. *Order Coverage*

Paragraphs IB and II of this Order shall not apply to any product, as hereinabove defined, which is manufactured, offered for sale or sold under any brand of Tuvache, Inc. or Sonia Rykiel.

I.

It is ordered, That respondent Germaine Monteil Cosmetiques Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for

sale, sale or distribution of products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A.

1. Fixing, establishing, controlling or maintaining, directly or indirectly, the resale price at which any dealer may advertise, promote, offer for sale or sell any product.

2. Requesting, requiring or coercing, directly or indirectly, any dealer to maintain, adopt or adhere to any resale price.

3. Requesting or requiring, directly or indirectly, any dealer to report the identity of any other dealer who deviates from any resale price; or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating said dealer.

4. Requesting or requiring that any dealer refrain from or discontinue selling or advertising any product at any resale price.

5. Hindering or precluding the lawful use by any dealer of any brand name, trade name or trademark of respondent in connection with the sale or advertising of any product at any resale price.

6. Conducting any surveillance program to determine whether any dealer is advertising, offering for sale or selling any product at any resale price, where such surveillance program is conducted to fix, maintain, control or enforce the resale price at which any product is sold or advertised.

7. Terminating or taking any other action to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product.

8. Threatening to withhold or withholding earned cooperative advertising credits or allowances from any dealer, or limiting or restricting the right of any dealer to participate in any cooperative advertising program for which it would otherwise qualify, because of the resale price at which said dealer advertises or sells any product, or proposes to sell or advertise any product.

9. Making any payment or granting any other consideration or benefit to any dealer because of the resale price at which any other dealer has sold or advertised any product.

B.

1. For a period of two (2) years from the service of this Order, orally suggesting or recommending any resale price to any dealer.

2. For a period of two (2) years from the service of this Order,

suggesting or recommending in writing any resale price to any dealer; *provided, however,* that after said two (2) year period, respondent shall not suggest or recommend to any dealer any resale price on any list or order form, or in any catalogue or stock control book, unless it is clearly and conspicuously stated on each page thereof where any suggested or recommended resale price appears, the following:

THE RETAIL PRICES QUOTED HEREIN ARE SUGGESTED ONLY. YOU ARE COMPLETELY FREE TO DETERMINE YOUR OWN RETAIL PRICES.

II.

1. Nothing contained in this Order shall preclude respondent from publishing or printing any resale price which is specified by any dealer for use or inclusion in any advertising, mailer or promotional material which said dealer intends to disseminate to consumers; *provided, however,* that for a period of two (2) years from the service of this Order, in connection with each advertising, mailer or promotional material which any dealer intends to disseminate to consumers, respondent shall make a written request to said dealer to specify its resale price(s), and shall disclose therein in a clear and conspicuous manner the following:

[GERMAINE MONTEIL OR ROCHAS PARIS] DEALERS ARE COMPLETELY FREE TO SPECIFY RETAIL PRICES OF THEIR OWN CHOOSING FOR INCLUSION IN THIS [ADVERTISING, MAILER OR PROMOTIONAL MATERIAL] PLEASE INSERT THOSE RETAIL PRICES YOU WISH TO BE PRINTED ON THIS [ADVERTISING, MAILER OR PROMOTIONAL MATERIAL].

2. After said two (2) year period, respondent shall not suggest any resale price to any dealer for use or inclusion in any advertising, mailer or promotional material which said dealer intends to disseminate to consumers, unless respondent, in connection with each advertising, mailer or promotional material, makes a written request to said dealer to review said advertising, mailer or promotional material for its resale price(s), and discloses therein in a clear and conspicuous manner the following:

[GERMAINE MONTEIL OR ROCHAS PARIS] DEALERS ARE COMPLETELY FREE TO SPECIFY RETAIL PRICES OF THEIR OWN CHOOSING FOR INCLUSION IN THIS [ADVERTISING, MAILER OR PROMOTIONAL MATERIAL]. YOU MAY CHANGE ANY PRICE WE HAVE SUGGESTED.

III.

It is further ordered, That respondent shall:

1. Within sixty (60) days after service of this Order, mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to each of its present dealers who sell Germaine Monteil brand products or Rochas Paris brand products. An affidavit shall be sworn to by an official of respondent verifying that the attached Exhibit A was so mailed.

2. Mail under serparate cover a copy of the enclosure set forth in the attached Exhibit A to any person, partnership, corporation or firm that becomes a new dealer selling Germaine Monteil brand products or Rochas Paris brand products within two (2) years after service of this Order.

3. For a period of two (2) years from the date of service of this Order, mail annually under separate cover a copy of the enclosure set forth in the attached Exhibit B to each of respondent's then present dealers who sell Germaine Monteil brand products or Rochas Paris brand products.

4. Within sixty (60) days after service of this Order, distribute a copy of the enclosure set forth in the attached Exhibit C to each of its present dealers who sell Tuvache brand products or Sonia Rykiel brand products. An affidavit shall be sworn to by an official of respondent verifying that the attached Exhibit C was so distributed.

IV.

It is further ordered, That respondent shall forthwith distribute a copy of this Order to all operating divisions of said corporation; to all personnel, agents or representatives having sales, advertising or policy responsibilities with respect to the subject matter of this Order, and that respondent secure from each such person a signed statement acknowledging receipt of said Order; and, for a period of three years from the date of service of this Order, to all new personnel, agents, or representatives having sales, advertising or policy responsibilities with respect to the subject matter of this Order, and that respondent secure from each such person a signed statement acknowledging receipt of said Order.

V.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respective corporation which may affect compliance obligations arising out of the Order.

VI.

It is further ordered, That respondent shall within seventy-five (75) days after service upon it of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this Order.

Commissioner Bailey dissented.

EXHIBIT A

Dear Retailer:

This letter is being sent to all [Germaine Monteil or Rochas Paris] accounts. On [date], Germaine Monteil Cosmetiques Corporation agreed to the entry of a Consent Order with the Federal Trade Commission concerning certain distribution practices. This Consent Order was entered into for settlement purposes only and does not constitute an admission that Germaine Monteil violated the law. As part of that Consent Order, we are obligated to send you this letter.

Germaine Monteil wants its [Germaine Monteil or Rochas Paris] accounts to know and understand the following:

1. You can advertise and sell [Germaine Monteil or Rochas Paris] products at any price you choose.

2. Germaine Monteil will not take any action against you, including termination, because of the price at which you advertise or sell [Germaine Monteil or Rochas Paris products].

3. Germaine Monteil will not suggest retail prices for any product until [2 years from the date of service of the Order].

4. The price at which you sell or advertise [Germaine Monteil or Rochas Paris] products will not affect your right to lawfully use [Germaine Monteil or Rochas Paris] trademarks or other identification in your sale or advertising of products bearing [Germaine Monteil or Rochas Paris] trademarks or identification.

5. You are free to participate in any cooperative advertising program sponsored by Germaine Monteil for which you would otherwise qualify, and to receive any advertising credit or allowance allowed thereunder regardless of the price at which you advertise a [Germaine Monteil or Rochas Paris] product.

6. Germaine Monteil will continue to publish or print mailers, advertising and other promotional materials which you intend to disseminate to consumers containing retail prices which you specify. Until [2 years from the date of service of this Order], in connection with each advertising, mailer or promotional material we will publish for you to disseminate to consumers, we will be requesting in writing that you specify the retail prices you wish to be printed on these materials.

After [2 years from the date of service of this Order], we will send you materials for your review which may contain our suggested retail prices. You are completely free, however, to change these prices, and we will then print the materials with the retail prices which you have specified.

7. The price at which a store sells or advertises a [Germaine Monteil or Rochas Paris] product is its own business. Germaine Monteil does not want to be informed by a [Germaine Monteil or Rochas Paris] account of the price at which any other store sells or advertises any [Germaine Monteil or Rochas Paris] product.

If you have any questions regarding the Consent Order or this letter, please call _____.

_____

for [Germaine Monteil Cosmetiques Corporation or Rochas Paris]

EXHIBIT B

Dear Retailer:

We wish to remind you of the following:

1. You can advertise and sell [Germaine Monteil or Rochas Paris] products at any price you choose.

2. Germaine Monteil will not take any action against you, including termination, because of the price at which you advertise or sell [Germaine Monteil or Rochas Paris products].

3. Germaine Monteil will not suggest retail prices for any product until [2 years from the date of service of the Order].

4. The price at which you sell or advertise [Germaine Monteil or Rochas Paris] products will not affect your right to lawfully use [Germaine Monteil or Rochas Paris] trademarks or other identification in your sale or advertising of products bearing [Germaine Monteil or Rochas Paris] trademarks or identification.

5. You are free to participate in any cooperative advertising program sponsored by Germaine Monteil for which you would otherwise qualify, and to receive any advertising credit or allowance allowed thereunder regardless of the price at which you advertise a [Germaine Monteil or Rochas Paris] product.

6. Germaine Monteil will continue to publish or print mailers, advertising and other promotional materials which you intend to disseminate to consumers containing retail prices which you specify. Until [2 years from the date of service of this Order], in connection with each advertising, mailer or promotional material we will publish for you to disseminate to consumers, we will be requesting in writing that you specify the retail prices you wish to be printed on these materials.

After [2 years from the date of service of this Order], we will send you materials for your review which may contain our suggested retail prices. You are completely free, however, to change these prices, and we will then print the materials with the retail prices which you have specified.

7. The price at which a store sells or advertises a [Germaine Monteil or Rochas Paris] product is its own business. Germaine Monteil does not want to be informed by a [Germaine Monteil or Rochas Paris] account of the price at which any other store sells or advertises any [Germaine Monteil or Rochas Paris] product.

If you have any questions please call _____ .

_____

for [Germaine Monteil
Cosmetiques Corporation or
Rochas Paris]

EXHIBIT C

Dear Retailer:

This letter is being sent to all [Tuvache or Sonia Rykiel] accounts. On [date], Germaine Monteil Cosmetiques Corporation agreed to the entry of a Consent Order with the Federal Trade Commission concerning certain distribution practices. This Consent Order was entered into for settlement purposes only and does not constitute an admission that Germaine Monteil violated the law. As part of that Consent Order, we are obligated to send you this letter.

Germaine Monteil wants its [Tuvache or Sonia Rykiel] accounts to know and understand the following:

1. You can advertise and sell [Tuvache or Sonia Rykiel] products at any price you choose.

2. Germaine Monteil will not take any action against you, including termination, because of the price at which you advertise or sell [Tuvache or Sonia Rykiel] products.

3. The price at which you sell or advertise [Tuvache or Sonia Rykiel] products will not affect your right to lawfully use [Tuvache or Sonia Rykiel] trademarks or other identification in your sale or advertising of products bearing [Tuvache or Sonia Rykiel] trademarks or identification.

4. You are free to participate in any cooperative advertising program sponsored by Germaine Monteil for which you would otherwise qualify, and to receive any advertising credit or allowance allowed thereunder regardless of the price at which you advertise a [Tuvache or Sonia Rykiel] product.

5. The price at which a store sells or advertises a [Tuvache or Sonia Rykiel] product is its own business. Germaine Monteil does not want to be informed by a [Tuvache or Sonia Rykiel] account of the price at which any other store sells or advertises any [Tuvache or Sonia Rykiel] product.

If you have any questions regarding the Consent Order or this letter, please call _____ .

_____

for [Tuvache, Inc. or
Sonia Rykiel]

IN THE MATTER OF

BATUS INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3099. Complaint, Dec. 6, 1982—Decision, Dec. 6, 1982

This consent order requires, among other things, that a Louisville, Kentucky management and holding company timely divest 200,000 square feet of its retail floor space, and reduce the volume of its retail sales by $20 million of 1981 sales. Further, the company is barred from making certain acquisitions in prescribed areas without prior Commission approval.

Appearances

For the Commission: *Daniel P. Ducore.*

For the respondent: *Ronald S. Rolfe, Cravath, Swaine & Moore,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, subject to the jurisdiction of the Commission, has acquired the stock or assets of Marshall Field & Company, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. Definitions

1. For purposes of this complaint, the following definitions shall apply:

a. *Respondent* means BATUS Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with headquarters address at 2000 Citizens Plaza, Louisville, Kentucky, as well as its officers, directors, employees, agents, parents, divisions, subsidiaries, affiliates, successors, assigns, and the officers, directors, employees or agents of BATUS' parents, divisions, subsidiaries, affiliates, successors or assigns.

b. *Marshall Field* means Marshall Field & Company, a corpora-

tion organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with principal offices at 25 East Washington St., Chicago, Illinois, as well as its officers, directors, employees, agents, its parents, divisions, subsidiaries, affiliates, successors and assigns, and the officers, directors, employees or agents of its parents, divisions, subsidiaries, affiliates, successors or assigns.

c. *SMSA* means a Standard Metropolitan Statistical Area as defined by the Office of Management and Budget, Statistical Policy Division, 1975 Edition, as amended.

d. *Department stores,* as used herein, corresponds with Bureau of Census Standard Industrial Classification No. 531, 1977 Census of Retail Trade. It refers to retail stores normally employing 25 or more people and engaged in selling some items of each of the following groups of merchandise:

(i) Furniture, home furnishings, appliances, and radio and TV sets; and

(ii) A general line of apparel for the family; and

(iii) Household linens and dry goods.

e. *Discount department store* means a department store distinguished from other types of department stores by certain characteristics of location, physical structure, services provided, products offered for sale, general pricing and merchandise strategies, or other factors.

f. *Traditional department store* means a department store of any type other than a discount department store.

g. *GMAF stores,* as used herein, refers to all retail establishments included in the following Bureau of Census Major Industry Groups and Standard Industrial Classifications as used in the 1977 Census of Retail Trade:

Census Number	Descriptions
Classification No. 531	Department stores
Major Industry Group No. 56	Other stores primarily engaged in the sale of apparel
Classification No. 533	Limited price variety stores
Classification No. 539	Miscellaneous general merchandise stores

Census Number	Descriptions
Major Industry Group No. 57	Furniture, home furnishings and equipment stores.

II. Respondent

2. BATUS is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with headquarters address at 2000 Citizens Plaza, Louisville, Kentucky.

3. Respondent was formed in January 1980 as both the holding and management company for the United States major business interests of its parent, B.A.T. Industries, p.l.c., of London, England.

4. Respondent is responsible for a substantial group of companies in the tobacco, retail and paper industries, including: Brown & Williamson Tobacco Corporation, Saks & Company, Gimbel Brothers, Inc., The Kohl Corporation, Thimbles Specialty Stores, Inc., and Appleton Papers, Inc.

5. In fiscal year 1980, respondent had sales of $4,161 million and operating income of $432 million.

6. In fiscal year 1981, respondent received retail revenues in the Milwaukee, Wisconsin SMSA in excess of $217,500,000 including approximately $130,400,000 from its eight Gimbels traditional department stores and $87,100,000 from its 14 Kohl's Department Stores.

7. In 1981 respondent was the largest department store retailer in the Milwaukee, Wisconsin SMSA.

8. In 1981 respondent, through its Gimbels stores, was the largest traditional department store retailer in the Milwaukee, Wisconsin SMSA.

9. In 1981 respondent was the largest retailer of certain merchandise categories in the Milwaukee, Wisconsin SMSA.

10. At all times relevant herein, respondent has been and is now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. Marshall Field

11. Marshall Field is a corporation organized, existing, and doing business under and by virture of the laws of the State of Delaware, with principal offices at 25 East Washington Street, Chicago, Illinois.

12. Through various retail divisions, Marshall Field operates

department stores and GMAF stores in various sections of the United States, including: the Chicago division (Marshall Field stores), Breuners, Frederick & Nelson, The Crescent, and J.B. Ivey & Company.

13. In fiscal year 1980, Marshall Field had net sales of approximately $1,013 million and net income of approximately $21 million.

14. In fiscal year 1981, Marshall Field received retail revenues in excess of $27 million from its one traditional department store in the Milwaukee, Wisconsin SMSA.

15. In 1981 Marshall Field was the eighth largest department store retailer in the Milwaukee, Wisconsin SMSA.

16. In 1981 Marshall Field was the fifth largest traditional department store retailer in the Milwaukee, Wisconsin SMSA.

17. In 1981 Marshall Field ranked among the top ten retailers of certain merchandise categories in the Milwaukee, Wisconsin SMSA.

18. At all times relevant herein, Marshall Field has been and is now engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. The Acquisition

19. Respondent, a wholly owned subsidiary of respondent and Marshall Field entered into a Stock Purchase Agreement dated as of March 15, 1982, providing for the issuance and sale by Marshall Field to BATUS' subsidiary of 2,000,000 shares of Marshall Field common stock, at $25.50 per share (the "Stock Purchase Agreement").

20. On or about March 17, 1982, a direct wholly owned subsidiary of respondent commenced a tender offer for a majority of the shares of Marshall Field, with the intention of acquiring the balance of the Marshall Field stock pursuant to a merger between Marshall Field and an indirect wholly-owned subsidiary of respondent (the acquisition of Marshall Field shares pursuant to such tender offer and merger or any other business combination with Marshall Field, together with the purchase of Marshall Field shares pursuant to the Stock Purchase Agreement, is hereinafter called the "Acquisition"). Under the terms of the acquisition as amended, the offering price was $30 per Common share. The acquisition was substantially completed on or about April 20, 1982. The total acquisition price,

including the shares to be acquired by merger, was approximately $365 million.

V. Trade and Commerce

21. One relevant line of commerce in which to evaluate the effects of respondent's acquisition of Marshall Field is retail sales by department stores.

22. Within the department store line of commerce, a relevant line of commerce in which to evaluate the effects of respondent's acquisition of Marshall Field is retail sales by traditional department stores.

23. Other relevant lines of commerce in which to evaluate the effects of respondent's acquisition of Marshall Field are retail sales of certain merchandise, including, but not limited to:

a. men's apparel;
b. women's apparel;
c. children's apparel.

24. The relevant section of the country is the Milwaukee, Wisconsin SMSA.

25. The department store market in the Milwaukee, Wisconsin SMSA is concentrated.

26. The traditional department store and certain apparel markets in the Milwaukee, Wisconsin SMSA are highly concentrated. Since 1977 only six firms have maintained a traditional department store presence in Milwaukee, with the top four firms accounting for over 75 percent of sales. In those years as well, four firms have controlled in excess of 65 percent of retail sales in certain apparel markets.

27. Barriers to entry into department store retailing in the Milwaukee, Wisconsin SMSA are substantial.

28. Prior to the acquisition here in question, respondent and Marshall Field were and had been actual competitors of each other in department store and traditional department store retailing and in the retail sale of other merchandise, and had been actual competitors of others engaged in similar retail activities in the Milwaukee, Wisconsin SMSA.

VI. Effects

29. The effect of respondent's acquisition of Marshall Field may be substantially to lessen competition or tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act,

as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

a. actual competition between Marshall Field and respondent in department store and traditional department store retailing and the retail sale of other merchandise in the Milwaukee, Wisconsin SMSA has been eliminated;

b. actual competition between competitors generally in department store and traditional department store retailing and in the retail sale of other mechandise in the Milwaukee, Wisconsin SMSA may be lessened;

c. concentration in department store and traditional department store retailing and in the retail sale of other merchndise in the Milwaukee, Wisconsin SMSA has been increased; and

d. the likelihood of eventual deconcentration may be lessened.

VII. Violation Charged

30. The acquisition by respondent of the stock and assets of Marshall Field constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Decision and Order

The Federal Trade Commission having initiated and investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and the Clayton Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its

charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent BATUS, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2000 Citizens Plaza, in the City of Louisville, State of Kentucky.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

Order

I.

It is ordered, That for purposes of this order the following definitions shall apply:

1. *BATUS* means BATUS Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with headquarters address at 2000 Citizens Plaza, Louisville, Kentucky, as well as its officers, directors, employees, agents, parents, divisions, subsidiaries, affiliates, successors, assigns, and the officers, directors, employees or agents of BATUS' parents, divisions, subsidiaries, affiliates, successors or assigns.
2. *Marshall Field* means Marshall Field & Company, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with principle offices at 25 East Washington St., Chicago, Illinois, as well as its officers, directors, employees, agents, its parents, divisions, subsidiaries, affiliates, successors and assigns, and the officers, directors, employees or agents of its parents, divisions, subsidiaries, affiliates, successors or assigns.
3. *SMSA* means a Standard Metropolitan Statistical Area as defined by the Office of Management and Budget, Statistical Policy Division, 1975 Edition, as amended.
4. *Department stores,* as used herein, corresponds with Bureau of the Census Standard Industrial Classification No. 531, 1977 Census of Retail Trade. It refers to retail stores normally employing 25 or

more people and engaged in selling some items of each of the following groups of merchandise:

(a) Furniture, home furnishings, appliances, and radio and TV sets; and

(b) A general line of apparel for the family; and

(c) Household linens and dry goods.

5. *GMAF stores,* as used herein, refers to all retail establishments included in the following Bureau of Census Major Industry Group and Standard Industrial Classifications as used in the 1977 Census of Retail Trade:

Census Number	Descriptions
Classification No. 531	Department stores
Major Industry Group No. 56	Other stores primarily engaged in the sale of apparel
Classification No. 533	Limited price variety stores
Classification No. 539	Miscellaneous general merchandise stores
Major Industry Group No. 57	Furniture, home furnishings and equipment stores.

II.

It is further ordered, That BATUS shall, within two (2) years from the date upon which this order becomes final, divest absolutely and in good faith such of its department stores in the Milwaukee, Wisconsin SMSA as will reduce the floor space of its department stores in that SMSA by an amount not less than 200,000 square feet and reduce its annual sales volume in that SMSA in an amount not less than $20 million as measured by fiscal 1981 sales.

A. Divestiture of any store under the terms of this order shall be made only to an acquiror approved in advance by the Federal Trade Commission.

B. Such divestiture shall include all leases, stock space and inventories but not the trade name or other proprietary names associated with the store.

C. Should BATUS divest the Marshall Field department store in Mayfair Mall it shall within two (2) years from the date of such divestiture open or begin construction of another Marshall Field retail establishment consisting of not less than 120,000 square feet of floor space in the Milwaukee SMSA. BATUS shall complete construction within three years from the time construction is begun. BATUS shall ensure that the store is a viable competitive retail

establishment for not less than five (5) years from the date of its opening.

III.

It is further ordered, That:

A. For a period of ten (10) years from the date upon which this order becomes final, BATUS shall not, directly or indirectly, through acquisition of stock, share capital, equity or any other interest in any equity, corporate or noncorporate, acquire any department store or GMAF store located within the Milwaukee, Wisconsin SMSA without the prior approval of the Federal Trade Commission; nor shall BATUS acquire any assets of any entity, corporate or noncorporate, operating any department store or GMAF store located within the Milwaukee, Wisconsin SMSA without the prior approval of the Federal Trade Commission.

B. For a period of two (2) years from the date upon which this order becomes final, BATUS shall not, directly or indirectly, through acquisition of stock, share capital, equity or any other interest in any equity, corporate or noncorporate, acquire any department store or GMAF store located in any SMSA in which BATUS then operates a department store or GMAF store without the prior approval of the Federal Trade Commission; nor shall BATUS acquire any assets of any entity, corporate or noncorporate, operating any department store or GMAF store located in any SMSA in which BATUS then operates a department store or GMAF store without the prior approval of the Federal Trade Commission.

C. For a period of three (3) years, beginning two (2) years from the date upon which this order becomes final, BATUS shall not, directly or indirectly, through acquisition of stock, share capital, equity or any other interest in any equity, corporate or noncorporate, acquire any department store or GMAF store located in any SMSA in which BATUS then operates a department store or GMAF store without the prior approval of the Federal Trade Commission; nor shall BATUS acquire any assets of any entity, corporate or noncorporate, operating any department store or GMAF store located in any SMSA in which BATUS then operates a department store or GMAF store without the prior approval of the Federal Trade Commission. Provided that this provision (III. C.) shall not be deemed to require prior approval of the Federal Trade Commission of acquisitions (1) of store sites, leases or inventories if the store property has not been operated as a department store or GMAF store for a period of ninety (90) consecutive days immediately prior to its

acquisition, or (2) of stock, share capital, equity or any other interest in any equity, corporate or noncorporate, or assets for a purchase price or other consideration less than $15 million.

IV.

It is further ordered, That BATUS shall submit within sixty (60) days after the date upon which this order becomes final, and every ninety (90) days thereafter, until such time that divestiture as required by paragraph II of this order has been accomplished, a report setting forth in detail the manner and form in which BATUS intends to comply, is complying, and has complied with the terms of this order and such additional information relating thereto as may from time to time be required. All such reports shall include a summary of contacts or negotiations with anyone for the specified assets, the identity of all such persons, and copies of all written communications to and from such persons.

V.

It is furthered ordered, That for a period of ten (10) years from the date upon which this order becomes final, BATUS shall notify the Federal Trade Commission at least thirty (30) days prior to any change in BATUS which may affect compliance with the obligations arising out of this consent order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation.

VI.

It is further ordered, That each year, for a period of ten (10) years from the date upon which divestiture as required by paragraph II of this order is accomplished, BATUS shall submit a report setting forth in detail the manner and form in which BATUS intends to comply, is complying or has complied with paragraph III of this order.

IN THE MATTER OF

CANADA CEMENT LAFARGE LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3100. Complaint, Dec. 21, 1982—Decision, Dec. 21, 1982

This consent order requires a Montreal, Canada producer of cement, among other things, to fully divest itself of a Chattanooga, Tenn. cement manufacturing plant and specified terminals associated with it within eighteen (18) months of the date the order becomes final to a Commission-approved purchaser. For five years, the respondent must offer to sell to the purchaser of the plant and terminals, twenty thousand tons of cement annually. Further, respondent must offer technical assistance for operation of the plant and terminals. Respondent is required to offer specific tonnages of clinker and cement to independent buyers on an annual basis for five years. Should respondent fail to divest itself of the Tennessee plant within the specified time period, it must then sell an Alabama plant and associated terminals within a twelve (12) month period.

Appearances

For the Commission: *Jerry A. Philpott, Jeffrey Behm, Martha Oppenheim, Allen Hickey* and *Franklin M. Lee.*

For the respondents: *R. Bruce MacWhorter* and *Edward H. Tuck, Shearman & Sterling,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that Canada Cement Lafarge Ltd. ("Canada Cement Lafarge"), a corporation subject to the jurisdiction of the Commission, intends to acquire all of the outstanding common stock of General Portland Inc. ("General Portland"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, as amended, 15 U.S.C. 45(b), stating its charges as follows:

I. Definitions

1. For the purpose of this complaint the following definitions shall apply:

a. *Cement* means portland cement Types I through V, as specified by the American Society for Testing and Materials.

b. *Clinker* means the intermediate product in the cement manufacturing process produced by crushing raw materials (primarily limestone, shale, clay, slate, silica, sand or iron ore) and then burning the mixture in high temperature rotary kilns.

c. *Relevant Markets* means the *Inland Market* and the *Florida Market,* as defined herein.

1. *Inland Market* means northern and eastern Alabama, Georgia, southeastern Tennessee and northern Florida.

2. *Florida Market* means the peninsular region of the State of Florida.

II. Canada Cement LaFarge

2. Canada Cement Lafarge is an approximately 54 percent-owned subsidiary of Lafarge Coppee S.A. Canada Cement Lafarge is engaged primarily in the production and sale of cement, including sales to purchasers in the Florida Market.

3. Lafarge Coppee S.A. is a French corporation with its principal executive offices at 28, rue Emile-Menier, 75116 Paris, France. LaFarge Coppee S.A. is the third largest manufacturer and seller of cement in the world. In 1980, Lafarge Coppee S.A. sold approximately 250,000 tons of clinker to purchasers in the Florida Market.

4. In 1980, Canada Cement Lafarge had total sales of approximately $711,100,000 (Canadian) and total assets in 1980 of approximately $853,700,000 (Canadian).

5. Citadel Cement Corporation is a wholly-owned subsidiary of Canada Cement Lafarge. Citadel Cement Corporation (a corporation organized and existing under the laws of Maryland) has its principal place of business at 2700 Cumberland Parkway, Atlanta, Georgia.

6. Citadel Cement Corporation owns a cement plant in the U.S. located at Demopolis, Alabama and sells cement in the Inland Market.

III. General Portland

7. General Portland is a corporation organized and existing under the laws of the State of Delaware, with its principal office at 12700 Park Central Place, Dallas, Texas.

8. General Portland is primarily engaged in the production and sale of cement.

9. In 1980, General Portland had cement sales of approximately $281,100,000 and total assets in 1980 of $320,800,000.

10. General Portland has cement plants located in Texas, Florida, Tennessee, California, Ohio, Kansas, and Pennsylvania. General Portland's Tennessee plant sells cement in the Inland Market. General Portland's Florida plants sell cement in the Florida market.

IV. Jurisdiction

11. At all times relevant herein General Portland and Canada Cement Lafarge have been engaged in the production and sale of cement in interstate commerce and General Portland and Canada Cement Lafarge are engaged in commerce as "commerce" is defined in the Clayton Act, as amended, 15 U.S.C. 12, *et seq.*, and each is a corporation whose business is in or affects commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*

V. The Acquisition

12. On or about October 2, 1981, Canada Cement Lafarge made a cash tender offer to acquire any or all of the outstanding common stock of General Portland at $47.00 (U.S.) per share for a total price of approximately $326 million (U.S.).

VI. Trade and Commerce

13. The relevant lines of commerce are the manufacture and sale of cement.

14. The relevant sections of the country are the Inland Market and the Florida Market.

VII. Actual Competition

15. General Portland and Canada Cement Lafarge are actual competitors in the relevant lines of commerce in the relevant sections of the country.

VIII. Effects

16. The effects of the proposed acquisition may be to substantially lessen competition or to tend to create a monopoly in the relevant lines of commerce in the Relevant Markets in violation of Section 7

of the Clayton Act, as amended, 15 U.S.C. 18, and the acquisition constitutes an unfair method of competition and unfair act or practice within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between General Portland and Canada Cement Lafarge in the manufacture and sale of cement in the Relevant Markets may be eliminated;

(b) actual competition among competitors generally in the manufacture and sale of cement in the Relevant Markets may be lessened;

(c) concentration in the manufacture and sale of cement in the Relevant Markets may be increased and the possibilities for eventual deconcentration may be diminished;

(d) mergers or acquisitions between other cement producers in the Relevant Markets may be fostered, thus causing a further substantial lessening of competition or tendency toward monopoly in the manufacture and sale of cement; and

(e) barriers to entry into the manufacture and sale of cement in the Relevant Markets may be increased.

Violations Charged

17. By reason of the foregoing, the proposed acquisition by Canada Cement Lafarge of the outstanding common stock of General Portland would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Decision and Order

The Federal Trade Commission having initiated an investigation of the proposed acquisition of the common stock of General Portland Inc. ("GP") by Canada Cement Lafarge Ltd. ("CCL"), and CCL and its parent, Lafarge Coppee S.A. ("Lafarge") having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge CCL and Lafarge with violations of the Federal Trade Commission Act and the Clayton Act; and

CCL, Lafarge, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by CCL and Lafarge of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the

signing of said agreement is for settlement purposes only and does not constitute an admission by CCL and Lafarge that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that CCL and Lafarge have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Canada Cement Lafarge Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of Canada, with its office and principal place of business located at 606 Cathcart, Montreal, Quebec, Canada H3B 1L7.

2. Lafarge Coppee S.A. is a French corporation with its principal executive offices at 28, rue Emile-Menier, 75116 Paris, France. Lafarge Coppee S.A. owns approximately 54% of the voting capital stock of Canada Cement Lafarge Ltd.

3. General Portland Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its principal executive offices located at 12700 Park Central Place, Dallas, Texas.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Canada Cement Lafarge Ltd., and the proceeding is in the public interest.

Order

For the purpose of this Order:

a. *Respondents* means Canada Cement Lafarge Ltd., a corporation organized, existing and doing business under the laws of Canada with its office and principal place of business located at 606 Cathcart, Montreal, Quebec, Canada H3B 1L7; Lafarge Coppee S.A., a French corporation with its principal executive offices located at 28, rue Emile-Menier, 75116 Paris, France; and their subsidiaries and the successors and assigns of their businesses.

b. *Subsidiary* means any corporation in which Respondents own,

either directly or indirectly, more than fifty percent (50%) of the outstanding shares of a class of securities having voting power to elect a majority of the Board of Directors of the corporation (whether or not any other class of security has or might have voting powers by reason of the happening of a contingency).

c. *Chattanooga Plant* means the cement manufacturing plant located at Chattanooga, Tennessee, presently owned or leased by General Portland Inc., and all assets associated with the plant as may be necessary for the plant to operate as a going concern and a viable competitor in the production and sale of cement. It does not include the Specified Terminals defined in (e) below.

d. *Demopolis Plant* means the cement manufacturing plant presently owned or leased by Respondents at Demopolis, Alabama, (and divestiture of the Demopolis plant shall include the granting of option(s) to acquire any or all of the associated distribution terminals at Birmingham, Alabama; Mobile, Alabama; Doraville, Georgia; Atlanta, Georgia; Bainbridge, Georgia; and New Orleans, Lousiana) and all other assets associated with the plant as may be necessary for the plant to operate as a going concern and a viable competitor in the production and sale of cement.

e. *Specified Terminals* means the distribution terminals in Knoxville, Tennessee; Atlanta, Georgia; Columbus, Georgia; and Tallahassee, Florida, all presently owned or leased by General Portland Inc., and the distribution terminal in Birmingham, Alabama, presently owned or leased by Respondents.

f. *Cement* means portland cement Types I through V, as specified by the American Society for Testing and Materials.

g. *Clinker* means the intermediate product in the cement manufacturing process produced by crushing raw materials (primarily limestone, shale, clay, slate, silica, sand or iron ore) and then burning the mixture in high temperature rotary kilns.

h. *Plant Area* means each area in the United States within a 300 mile radius of any cement plant owned or leased by Respondents in either the United States or Canada. For any acquisition(s) of assets subject to Paragraph VIII of this Order, *Plant Area* shall be determined as of the date of such acquisition(s).

i. *Independent Buyer* means any cement manufacturer other than Respondents.

I

It is ordered, That Respondents, their officers, directors, agents, representatives, and employees, within eighteen months from the

date on which this Order becomes final, shall divest themselves, absolutely, in good faith, of all right, title and interest in the Chattanooga Plant together with all additions and improvements thereto. If, at the expiration of eighteen months from the date on which this Order becomes final, Respondents have not divested the Chattanooga Plant, and no application for approval by the Commission of the divestiture of the Chattanooga Plant is pending, then Respondents shall either (1) divest the Chattanooga Plant within three months; or (2) divest the Demopolis Plant within twelve months; *provided, however,* that if at the expiration of eighteen months from the date on which this Order becomes final, an application for divestiture of the Chattanooga Plant is pending, the additional time that Respondents have to divest the Chattanooga Plant (three months) or the Demopolis Plant (twelve months) shall not begin to run, and an obligation to sell the Demopolis Plant shall not accrue, until and unless the pending application is finally disapproved by the Commission. Divestiture shall be made to an acquirer approved by the Commission.

II

It is further ordered, That as part of any divestiture of the Chattanooga Plant, Respondents shall offer to the proposed acquirer option(s) to acquire Respondents' rights, title and interest in the Specified Terminals and all of their right, title and interest to the surface and mineral rights to, and all improvements upon, the approximately 3,000 acres of land located in McMinn County near Calhoun, Tennessee, on the Hiawassee River and presently owned or leased by General Portland Inc.

III

It is further ordered, That for a period of five years from the date of their divestiture of the Chattanooga Plant, Respondents shall offer to sell at commercially reasonable wholesale prices, terms and conditions 20,000 tons of cement annually to the acquirer of the Chattanooga Plant.

IV

It is further ordered, That for a period of five years from the date of their divestiture of the Chattanooga Plant, Respondents shall offer to provide technical assistance to the acquirer of that plant at commercially reasonable prices, terms and conditions. If an acquirer

of the Chattanooga Plant requests technical assistance within a three year period from the date of his acquisition of the Chattanooga Plant for a modernization or replacement project extending beyond the five year period, and agrees to commercially reasonable prices, terms and conditions, Respondents shall provide that technical assistance for a reasonable time to complete the project.

V

It is further ordered, That for a period of five years from the date that this Order becomes final, Respondents shall offer to sell, or sell, including sales pursuant to contracts in force at the time this Order becomes final, to Independent Buyers with a cement manufacturing or grinding plant or distribution terminal in Florida for shipments to or delivery in Florida at commercially reasonable wholesale prices, terms and conditions: (1) at least 250,000 tons of cement annually; and (2) at least 250,000 tons of clinker annually.

VI

It is further ordered, That Respondents shall not be required to divest the Demopolis Plant in the event that, as a result of events beyond the control of Respondents, the said Chattanooga Plant has ceased to exist physically or to be operable as a plant for the production of cement.

VII

It is further ordered, That pending divestiture of the properties required by Paragraph I of this Order, or that may be divested under Paragraph II of this Order, Respondents shall not cause or permit the wasting or deterioration of such properties, in any manner which may impair the marketability or viability of any such properties, except for normal wear and tear or in the ordinary course of operation.

VIII

It is further ordered, That for a period of ten years Respondents shall not acquire, without the prior approval of the Commission, any cement manufacturing or grinding plant or distribution terminal in South Carolina, Georgia, Alabama, Tennessee and Florida or in any Plant Areas in which Respondents, at the time of the acquisition, are then engaged in the manufacture of cement.

IX

It is further ordered, That within one hundred and twenty days from the date on which this Order becomes final, and every one hundred and twenty days thereafter until they have fully complied with Paragraphs I and II of this Order, Respondents shall submit in writing to the Commission a verified report setting forth in such detail as the Commission staff shall request the manner and form in which they intend to comply, are complying or have complied therewith.

X

It is further ordered, That within sixty days from the date on which this Order becomes final, and annually thereafter upon each anniversary of the date on which this Order becomes final until the expiration of the prohibitions in Paragraph VIII of this Order, Respondents shall submit in writing to the Commission verified reports listing all acquisitions of any equity interest in, and mergers with, any business entity, corporate or noncorporate, engaged in the production of cement in the United States, the date of each such acquisition or merger, and such additional information relating thereto as may from time to time be requested.

XI

It is further ordered, That with respect to Paragraphs III and V of this Order, Respondents shall maintain adequate records to be furnished upon request of the staff of the Commission, which evidence compliance with the provisions of this Order, including, but not limited to records showing: the amount of cement or clinker sold pursuant to Paragraphs III or V of this Order, the identity of the purchasing persons and the prices, terms and conditions of the sale of such cement or clinker.

XII

It is further ordered, That Respondents shall notify the Commission at least thirty days prior to any proposed corporate changes which may affect compliance obligations arising out of this Order, such as dissolution, assignment or sale resulting in the emergence of successor corporations.

IN THE MATTER OF

AMERICAN MEDICAL ASSOCIATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9064. Final Order, Oct. 12, 1979—Modifying Order, Dec. 22, 1982

This order reopens the proceeding and modifies Paragraph IV(A) of the Commission's order issued on Oct. 12, 1979 (94 F.T.C. 701), *modified* May 19, 1982 (99 F.T.C. 440). The modification eliminates the requirement that the AMA utilize first class mail to send a copy of the order to its members.

MODIFICATION OF DECISION AND ORDER

The American Medical Association ("AMA") has requested that the Commission modify its Order in Docket No. 9064 to relieve AMA of its obligation under Paragraph IV(A) of the Order to send by first-class mail a copy of a letter, Appendix A to the Order, to each of its present members.

After duly considering AMA's petition, the Commission on December 22, 1982 determined that public interest considerations warrant reopening of the order, and that Paragraph IV(A) should be modified to relieve AMA of the obligation to send the required letter by first-class mail. Accordingly,

It is ordered, That the proceeding be, and it hereby is, reopened.

It is ordered, That the Order be, and it hereby is, modified by substituting for Paragraph IV(A) of the Order, the following:

IV

It is further ordered, That respondent American Medical Association:

A. Send by mail under separate cover a copy of a letter in the form shown in Appendix A to this Order to each of its present members and to each constituent and component organization of respondent, within sixty (60) days after this Order becomes final.

IN THE MATTER OF

THE KROGER COMPANY

MODIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9102. Final Order, Sept. 25, 1981—Modifying Order, Dec. 29, 1982

As agreed to by the FTC and The Kroger Company, this Order modifies the Commission's Final Order issued on September 25, 1981 (98 F.T.C. 639). The Modified Final Order prohibits Kroger from advertising survey-based food price comparisons that refer to a particular city, metropolitan area or competitor, unless: (1) employees responsible for pricing Kroger's products do not know which items have been selected for the survey prior to its completion; and (2) the claim does not generalize the results of the survey to a product category that has been systematically excluded from the survey, unless such generalization clearly and conspicuously discloses that the product category has been excluded from the survey. The Order, which will remain in effect until December 31, 1984, dismisses the allegations contained in Paragraphs Six B and D, and Seven B and D of the complaint.

MODIFIED FINAL ORDER

The Kroger Company having filed in the United States Court of Appeals for the Eleventh Circuit a petition for review of the order to cease and desist issued herein on September 25, 1981; and the Commission and the Kroger Company having subsequently agreed upon the provisions of a final order modifying the order of September 25; and the Commssion having the authority to modify its order by virtue of the fact that the record in the proceeding has not been filed with the court of appeals (*see* 15 U.S.C. 45(b) and Commission rule 3.72(a)); accordingly,

It is ordered That the order of September 25, 1981, be, and it hereby is, modified in accordance with the parties' agreement to read as follows:

ORDER

I.

A. *Respondent* means the Kroger Company, a corporation, its successors and assigns, and its officers, representatives, agents and employees, acting directly or indirectly through any corporation, subsidiary or other device in the sale of food, household items and other merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

b. *Survey-based food price comparison* means an advertised claim

that refers to a survey of respondent's and any competitor's food prices and that projects the result obtained from the survey sample to items not included in the survey.

II.

It is ordered, That respondent cease and desist from advertising any survey-based food price comparison that refers, directly or indirectly, to a particular city, metropolitan area or competitor (or competitors) by name or other designation unless:

A. Employees responsible for pricing respondent's merchandise do not know which items have been selected for the survey prior to its completion, and

B. The claim does not generalize the results of the survey to a product category that has been systematically excluded therefrom; *provided, however,* that no such generalizaton will be deemed to extend to any product category whose systematic exclusion is disclosed clearly and conspicuously in respondent's advertisements.

III.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon it, file with the Commission a written report setting forth in detail the manner and form in which it has complied, or intends to comply, with this order.

IV.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment, or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

V.

It is further ordered, That the provisions of this order shall remain in effect until December 31, 1984.

VI.

It is further ordered, That the allegations contained in Paragraphs

Six B and D, and Seven B and D, of the Complaint be, and they hereby are, dismissed.

Commissioner Pertschuk dissented.

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK

I view the willingness of a majority of the Commission to accept what is essentially an illusory order as a product of the sustained ideologically-based attack on this case by the Chairman and the Director of the Bureau of Consumer Protection in connection with their proposals for weakening the Commission's deception and advertising substantiation standards.

Before I explain the inadequacies of the modified final order agreed to by Kroger and the Commission, I believe it is useful to review briefly the basic facts of the case to remind the Commission that its initial finding of liability and accompanying order were quite reasonable.

Kroger ran a lengthy and remarkably successful advertising campaign relying on its own price survey, comparing it to competitors. As those familiar with the history of *advertised* supermarket price surveys know, there is a powerful tendency to structure such surveys to produce results favorable to the advertiser. In Kroger's case, this incentive resulted in a number of survey characteristics. First, its comparison was limited to "dry groceries"—that is, fresh meat and produce were excluded though the record showed Kroger tended to be higher in those categories; second, the person in each marketing area who set prices for the items, the "grocery merchandiser," was responsible for selecting the items to be placed in the survey; third, in some cities, the grocery merchandiser systematically put items in the survey that Kroger was buying from manufacturers on special promotion and in turn temporarily reducing at retail.

Kroger almost always "won" its own survey and emphasized in weekly newspaper ads that it had again been shown to have the lowest prices in each metropolitan area. There is something of an abstract debate in the Commission's opinion about whether Kroger claimed to have *more* lower prices, or the *most* lower prices, compared to its competitors, but the key claims found by the Commission were that it was cheaper overall to shop at Kroger and that Kroger had a survey which backed up that claim. 98 F.T.C. 639, 736 (1981).

At the same time Kroger was conducting its advertised survey, it was regularly conducting two internal surveys for its own management. One of these was a market basket survey—that is, a survey

which showed the cost of a typical "market basket" of food, purchased on a weekly basis for a household, compared with Kroger's competitors. The record evidence indicates that this market basket had all the earmarks of a reliable survey. The persons who chose the items did some rough and ready—but reasonable—weighing of the items and changed the items over time. Most importantly, they had no incentive to manipulate the items because the results were for internal use only.

The record in the case shows how Kroger's *internal* survey stacked up with its *advertised* survey. In general, Kroger did relatively well in the grocery category, and not so well in meat and produce. For example, of all the market basket checks conducted by Kroger in Ft. Wayne, Indiana, it was lowest on grocery items five out of nine times but lowest on produce two out of nine times and lowest on meat one out of nine times. The patterns in the other cities are similar. 98 F.T.C. at 683-86. Yet virtually every week, Kroger's advertised survey proclaimed it to be the chain with the lowest prices. The record contains numerous examples where both of Kroger's internal surveys—the market basket comparison and a comparison of the number of items on which Kroger was lower—showed Kroger to be higher than others at the same time the advertised survey showed Kroger to be lowest. (*See* CX 813)

In response to these practices the Commission issued an order covering any future advertised survey upon which Kroger bases a claim comparing its prices to those of its competitors in a particular area. That order, in its key parts, said that if Kroger advertised such a survey, it would have to: 1) make sure the items were selected in a representative way and that employees responsible for pricing products did not know the items on the survey; and 2) make sure claims based on the survey fairly represented the results of the survey (for example, if major categories of food were left out, the claim would have to make that clear). There is little doubt that Kroger's own internal survey could have met those requirements. It is inconceivable to me that those standards are unreasonable and that American consumers would not feel misled if they were violated.

Yet most of the modest but fundamental standards contained in the final order have been jettisoned by the Commission in the settlement with Kroger, apparently on some theory that meeting them would disrupt the flow of "useful" information. It is a highly dubious proposition that advertisements of surveys in which items aren't chosen representatively or which draw conclusions which do not fairly represent the actual survey are particularly useful for

anything. Apparently believing that elimination of these requirements did not weaken the order enough, the Commission also finally gave in to Kroger's central demand for an automatic "sunsetting" of the order after a short period of time.

Neither the record, the reasonable exercise of our remedial discretion, nor considerations of competitive equity compel these major concessions and modifications to the final order that was once deemed by the Commission to be a reasonable and restrained resolution of this case. The majority opinion authored by Commissioner Clanton set forth clear justification for the prescribed sampling methods and survey misrepresentation provisions that are deleted from the modified order. Nothing has persuaded me since that time that these provisions are now either unnecessary or unwarranted. As explained in some detail in the opinion, the prescribed sampling methods provided reasonable flexibility and specificity to Kroger on suitable means of sampling for its price surveys. Also, the general fencing-in prohibition on survey misrepresentations was reasonably related to the core deception in Kroger's price patrol, *e.g.*, overall price claims which were misleading because they failed to disclose the systematic exclusion of large product categories from the survey.

With respect to the two-year sunset provision, there are better ways of responding to any legitimate concerns of potential competitive inequity that Kroger may have from being "singled out" by the Commission. These could include serving the order on Kroger's competitors under the Commission's Section 205 authority, and reconsidering the order in the future should the Commission demonstrate a refusal to hold Kroger's competitors to the same standards. These alternatives would strike a much better balance between the agency's interest in preserving the integrity of its record findings and enforcement credibility in this case, with Kroger's interest in avoiding unfair competitive injury. With the inclusion of the short-term sunset provision, the order loses all credibility in the industry, assuring that no Kroger competitor will feel obliged to obey it, even if placed on notice of its requirements by the Commission. Further, and even more damaging to the Commission's enforcement interests, such an automatic sunset provision (which to my knowledge is virtually unprecedented in consumer protection cases) would create an irresistible temptation for other respondents to demand similar sunset relief on competitive equity or other grounds, particularly in this era of deregulation and decreased enforcement activity. If the basis of the Commission's concession to Kroger's demand for automatic sunset protection is that a majority of the

Commission no longer believes in its own findings of liability or its ability to defend them on appeal, then it would be more straightforward simply to admit mistake and dismiss the case. At the very least, that would avoid the dangerous precedent that will be set for our consumer protection mission by acceptance of this sunset provision.

As my colleagues know, I was not adverse to settlement of this case on justifiable grounds. But I am not so anxious to settle that I would acquiesce to settlement on these terms. Yet it seems to me that it is precisely such an overwhelming urge to settle this case at all costs that has driven the Commission toward acceptance of this modified order.

Because I am not prepared to pay such a price, I am dissenting from the Commission's agreement with Kroger.

Sale of cement manufacturing plant would be in compliance with divestiture pursuant to proposed Consent Order. [*811 0158, Canada Cement Lafarge Ltd.*]

August 18, 1982

Dear Mr. Munin:

This is in response to your request of [May 18, 1982], on behalf of Canada Cement Lafarge Ltd. (CCL), for an advisory opinion pursuant to Sections 1.1-1.4 of the Federal Trade Commission's Rules of Practice and Procedure, 16 C.F.R. 1.1-1.4 (1982). The Commission has carefully reviewed your application and has concluded that, should the Agreement Containing Consent Order (File No. 811-0158, In the Matter of Canada Cement Lafarge Ltd.) ultimately be accepted, sale by General Portland (GP) of the Chattanooga Plant to RC Cement (RC) (or to the newly-formed affiliate described in your Application) would be in compliance with Paragraphs I through IV of the Order.

Rule 1.1(a) (2) provides that an advisory opinion may be issued on a proposed corporate acquisition so long as it is not the subject of a current proceeding (Section 1.1(b) (1)). Your proposed sale to RC falls within Rule 1.1, since that sale is not currently under investigation. But, inasmuch as the sale is intended as a divestiture pursuant to a consent order, your application has presented an unusual procedural issue. You request prompt approval of the sale; however, the consent agreement is still before the Commission, pending the sixty days' public comment period required by Section 2.32 of the Rules of Practice following its provisional acceptance by the Commission. On the other hand, the thirty days' public comment period required by Section 2.41(f) of the Rules of Practice for applications for approval of proposed divestitures cannot commence in the absence of an outstanding order.

Nevertheless, your application presents persuasive reasons for Commission approval of the purchaser before the end of the public comment period applicable to the provisionally accepted order. The Commission has determined that issuance of an advisory opinion concerning the acceptability of RC as a purchaser, subject to eventual approval of the consent order itself, is appropriate at this junction. Publication of CCL's application and the attendant press release on May 28, 1982, have provided the thirty days' public comment that would have been required by Rule 2.41(f). This Advisory Opinion, however, in no way commits the Commission to finally accept the consent order, nor does it address the legality of the sale to RC under any order, rule or law other than the consent order.

The Commission's conclusion that the sale of the Chattanooga plant to RC would conform to the requirements of Paragraphs I-IV of the consent order is based in part on data supplied by CCL in support of the application and in part on data obtained by the Commission's staff in the investigation of CCL's acquisition of GP and other recent acquisitions in the cement industry. In November 1981, following an investigation of CCL's proposed acquisition of GP, CCL and attorneys of the Bureau of Competition entered into an Agreement Containing Consent Order whereby CCL would be required to sell either GP's Chattanooga, Tennessee, plant within eighteen months of the date on which the Order becomes final, or CCL's Demopolis, Alabama, plant within an additional twelve months.* The Commission has provisionally accepted this Agreement, and the consent order it contained has been placed on the public record for comment. In the interim, CCL has negotiated an agreement with RC to purchase the Chattanooga plant along with certain of its raw material sources and distribution terminals in Atlanta and Columbus, Georgia and Knoxville, Tennessee. The letter of intent signed by GP and RC on May 4, 1982, provides that if the sale is not consummated by a certain date, RC may withdraw from its agreement to purchase the assets in question. RC is currently the only potential purchaser contacted by GP who is pursuing purchase of the Chattanooga plant.

RC is a St. Louis-based holding company which owns 100% of the stock of River Cement Company (River). River produces cement in Missouri and ships it to distribution terminals along the Ohio and Mississippi Rivers. River does not appear to compete directly with the Chattanooga plant of GP. Although both firms sell cement in Tennessee, River's sales from its terminal in Memphis, are concentrated in western Tennessee and the Chattanooga plant sells in the eastern part of the state. Based on available data, the Commission finds that the sale of GP's Chattanooga plant to RC would probably not have a substantial anticompetitive effect in any relevant market.

River is an experienced cement producer that may be expected to become a strong competitor of CCL's Demopolis plant in the area served by the Chattanooga plant.

As noted above, your application requesting this Advisory Opinion has been placed on the Commission's public record in accordance with Section 1.4 of the Commission's Rules, 16 C.F.R. 1.4 (1982). Your separate request, pursuant to Rule 1.4, for continuing confidential treatment of the information listed on pages 6 and 7 of the nonpublic version of your application, has been considered by the

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* The Bureau of Competition investigation had shown that GP's plant at Chattanooga and that of CCL at Demopolis are direct competitors in the sale of portland cement in southeastern Tennessee, Alabama, Georgia, and the northern Florida panhandle.

Commission. The Commission will not disclose the above described information without giving CCL ten days advance notice of intended disclosure, as required by Section 6(f) and Section 21(c) of the Federal Trade Commission Act as amended, 15 U.S.C. 46(f), 57-b-2(c).

By direction of the Commission.

Application for Advisory Opinion

May 18, 1982

General Portland Inc. ("GP"), an indirectly wholly-owned subsidiary of Canada Cement Lafarge Ltd. ("CCL"), respectfully applies to the Federal Trade Commission (the "Commission") for an advisory opinion pursuant to Section 1.1(a) (2) of the Rules of Practice and Procedure issued by the Commission (the "Rules"), relating to a course of conduct which GP currently proposes to pursue. Moreover, for the reasons stated herein, GP requests that this application be given EXPEDITED TREATMENT in being placed on the public record for a 30-day public comment period and in being acted upon by the Commission following the end of that public comment period.

A. *Background.*

On October 2, 1981, CCL (through a subsidiary) made a cash tender offer for any or all of the outstanding common stock of GP. On November 13, 1981, CCL announced that it had purchased 4,870,245 shares of GP stock and by November 20, 1981, CCL held 93.1% of such stock.

Prior to the acquisition of the GP stock, the staff of the Commission initiated an investigation of the proposed acquisition of GP by CCL. CCL, Lafarge Coppee S.A. (the 54% parent of CCL) and the Commission staff signed an agreement containing a consent order (the "Consent Order") settling the investigation on November 11, 1981. The Consent Order will be binding on CCL, Lafarge Coppee and their subsidiaries, including GP.

The Consent Order still has not been provisionally accepted by the Commission or placed on the public record for comments, more than six months after it was signed. In light of the 60-day public comment period required for proposed consent orders under the Rules, the length of time for the Commission to complete its internal processes of reviewing the Consent Order, responding to any public comments and finally acting upon the Consent Order, and any delays that may be inherent in the Commission's summer schedule, it appears unlikely to GP that the Consent Order will be issued in final form before September, even if the Consent Order is placed on the public record by June 1 (only two weeks from now).

Since the Consent Order was signed, GP has been actively searching for potential buyers for the Chattanooga cement plant of GP (the "Chattanooga Plant"), so as to be able to divest the Chattanooga Plant in compliance with Articles I through IV of the proposed Consent Order. Such a buyer has been found and a letter of intent signed by it and GP on May 4, 1982: RC Cement Company ("RC Cement"). GP believes that the Commission will find RC Cement to be a highly acceptable buyer for the Chattanooga Plant.[1]

However, GP believes that it is extremely important to obtain a Commission determination prior to June 30, 1982 that *if* the Commission ultimately issues the Consent Order, RC Cement would be an approved buyer for the Chattanooga Plant under the Consent Order, and that the prior sale of the Chattanooga Plant to RC Cement or its newly-formed affiliate would be in compliance with Articles I through IV of the Consent Order, so that a sale may be made to RC Cement by June 30.

A delay in obtaining such a Commission determination until the Consent Order itself becomes final—a delay of at least two or three months after June 30—will significantly increase the risks of long-term harm to the Chattanooga Plant's competitive health and that unexpected developments in the U.S. economy or the U.S. cement industry might result in the loss of this highly desirable buyer. Therefore, for the reasons stated in more detail below, GP respectfully requests an advisory opinion from the Commission answering the following question:

> If the Federal Trade Commission ultimately issues a consent order containing Articles I through IV, inclusive, of the Consent Order signed on November 11, 1981 by Canada Cement Lafarge Ltd., Lafarge Coppee S.A. and the Commission staff, then will the prior sale described in Exhibit 1 hereto to RC Cement or its affiliate be to "an acquirer approved by the Commission" within the meaning of such Article I and in compliance with the requirements of such Articles I through IV, inclusive?

B. *Basis on Which Advisory Opinion is Sought.*

Under Section 1.1(a) (2) of the Rules, GP may request advice from the Commission with respect to a course of action that it intends to pursue, where the matter involves a proposed corporate acquisition (such as RC Cement's proposed acquisition of GP's Chattanooga Plant).[2]

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[1] In addition to making this application for an advisory opinion from the Commission, GP filed an application on May 11, 1982 with the Commission seeking approval under the Consent Order—if and when the Consent Order is issued in final form—of RC Cement or a newly-formed affiliate thereof as a buyer of the Chattanooga Plant. A copy of this May 11 application is attached as Exhibit 1. [Not reproduced herein.]

[2] Section 1.2(b) and Section 2.41(f) of the Rules do not apply to GP's request for an advisory opinion here, since these two provisions in the Commission's Rules apply only where there is an "*outstanding*" order to cease and desist issued by the Commission that might be violated by the proposed course of conduct. In GP's case, there is no outstanding order applicable to it, nor will there be such an order prior to September. Moreover, an advisory

(*footnote continued*)

C. *Facts and Arguments Relevant to Issuance of an Advisory Opinion.*

In its efforts to comply with the requirements of Articles I through IV of the proposed Consent Order, GP has—even prior to the effectiveness of the Consent Order—actively searched for a buyer for the Chattanooga Plant which would prove acceptable to the Commission. In that search, GP has looked aggressively for a buyer which had no competitive overlaps with the Chattanooga Plant, which did not have a major share of the U.S. cement industry, and which possesses the skills and resources to enable it to use the Chattanooga Plant to compete vigorously after the divestiture.

1. *Description of the Buyer.*

GP believes it has found such a desirable buyer in RC Cement. RC Cement is a holding company based in St. Louis, Mo., which owns 100% of River Cement Company ("River"). River owns one cement plant in Festus, Mo., and a grinding facility in Orange, Tex. capable of grinding clinker into cement. River's Festus cement plant has a cement capacity of 1,150,000 tons annually and it supplies cement to five terminals along the Ohio and Mississippi Rivers (at St. Louis, Mo., Cincinnati, Oh., Memphis, Tenn., Natchez, Miss., and Burnside, La.). The Orange, Tex. grinding plant has a capacity to grind clinker into cement at a rate of 400,000 tons annually. The Orange plant has no terminals.

GP understands that River's facilities do not sell any cement at all in any county in which GP's Chattanooga Plant sells cement. For example, the Chattanooga Plant sells no cement in western Tennessee or northern Mississippi (that is, in areas served by River's Memphis terminal) or in Kentucky (that is, in areas served by River's Cincinnati terminal). River, in turn, has no terminals or distribution facilities in central or eastern Tennessee, northeastern Alabama or northwestern Georgia (that is, in areas served by the Chattanooga Plant).

GP further understands that RC Cement is affiliated with another small U.S. cement producer based in the Lehigh Valley of Penn-

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(*footnote continued from previous page*)

opinion may be granted here, since (a) the question raised is not hypothetical in nature, (b) the course of conduct raised by GP's application (that is, GP's sale of the Chattanooga Plant to RC Cement) is not the same or substantially the same as the course of conduct under investigation or the subject of a current proceeding involving the Commission (that is, CCL's recent acquisition of GP), and (c) an informed opinion may be formed by the Commission without extensive investigation, clinical study, testing or collateral inquiry. As a result, prior to the final issuance of the Consent Order, GP has no recourse to Commission advice concerning GP's planned sale of the Chattanooga Plant to RC Cement other than by seeking an advisory opinion pursuant to Section 1.1(a) of the Rules.

sylvania: Hercules Cement Co. A 40% shareholder in RC Cement is IFINT S.A. (formerly IFI International S.A.), a publicly-held Luxembourg-based investment company in which Istituto Finanziario Industriale S.p.A. ("IFI"), an Italian company, owns a 24.6% interest (through two 100% subsidiaries).

IFI also owns approximately 51% of Unicem S.p.A., a publicly-held Italian cement company which owns an additional 20% of RC Cement. (As a result, IFINT and IFI together own 60% of RC Cement.) The remaining 40% of RC Cement is owned (through a 100% subsidiary) by . . . an Italian entity independent of both IFI and IFINT which has cement operations in Italy and Brazil.

GP understands that IFINT is the largest shareholder in U.S. Cement Co. ("U.S. Cement"), which owns 100% of Hercules Cement Co. IFINT owns 46.7% of U.S. Cement stock. Unicem and . . . (an independent company with cement operations in the U.K. and Australia) own the remaining interests in U.S. Cement, with 20% and 33.3%, respectively. (As a result, through IFI's controlling interest in Unicem, IFI and IFINT together own 66.7% of the stock of U.S. Cement.)

Hercules has a single cement plant, located in Stockerton, Pa., with a capacity of 700,000 tons. It operates a single terminal, located in Fort Meade, Maryland. CCL understands that Hercules sells no cement in any county in which the Chattanooga Plant sells cement.

Under the May 4 letter of intent with RC Cement, the buyer of the Chattanooga Plant may be RC Cement itself or a newly-formed affiliate thereof. Such an affiliate would involve only the existing shareholders owning interests in RC Cement and U.S. Cement, although both . . . and . . . are believed to be still considering whether or not to be shareholders in any newly-formed company acquiring the Chattanooga Plant. Regardless of whether these two companies choose to participate, however, IFI and IFINT will control a majority of the buyer's stock[3] As a result, IFI and IFINT will together own a controlling interest in the Chattanooga Plant, just as they together hold majority interests in RC Cement and U.S. Cement.

GP believes that RC Cement or its new affiliate will very well fit the requirements of the Commission relating to the divestiture of the Chattanooga Plant, if the Consent Order is issued in final form.

The affiliated U.S. cement companies River and Hercules do not compete at all with the Chattanooga Plant. They are owned by European companies which have slowly been building up a presence in the U.S. cement industry and are seeking to expand into new areas of the

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[3] At present, GP understands the affiliate would be owned as follows: . . . would own 33.3% of the new affiliate and a second newly-formed company ("Newco-2") would own 66.7%. Newco-2 would in turn be owned 40% by IFINT (through two 100% subsidiaries), 20% by IFI (through its 51%-owned Unicem) and 40% by . . .. Therefore, IFI and IFINT would together own a majority interest in the majority shareholder (Newco-2) of the actual acquiring affiliate.

U.S. by this acquisition. The combined cement capacities of River and Hercules of 2,250,000 tons represent only 2.3% of 1980 U.S. cement capacity (based on Portland Cement Association data), ranking the affiliated companies as 17th in combined size among U.S. cement producers. Even while comparatively small, however, RC Cement and its affiliate Hercules clearly possess the skill and resources to compete successfully using the Chattanooga Plant.

2. *Basis for GP's Request for an Expedited Advisory Opinion.*

However desirable RC Cement or its new affiliate may be as a buyer, it will be of little avail if GP loses RC Cement as the buyer of the Chattanooga Plant. It is certainly not in the public interest to delay the sale of the Chattanooga Plant to an acceptable buyer. GP believes that there are imperative reasons for obtaining approval of RC Cement or its newly-formed affiliate (conditioned on the possible issuance of the Consent Order) from the Commission so that GP can sell the Chattanooga Plant to this buyer by the planned closing date of June 30, 1982.

Delays in obtaining Commission approval or in consummating the sale entail considerable risks of losing RC Cement. If lost, GP does not know how long it will take to find a new buyer or whether one will be found at all within the time periods imposed by the Consent Order.

First, GP must emphasize that GP and RC Cement have only signed a non-binding letter of intent. Both parties seek to close the transaction as soon as possible, with a projected closing date of June 30. If the parties have not consummated the transaction by June 30, RC Cement will be free to walk away from the purchase.

Second, the greater the delay before GP can sell the Chattanooga Plant, the greater the risk of unforeseeable adverse events occurring in the U.S. economy or the U.S. cement industry that would endanger or frustrate the proposed sale. For example, a major U.S. cement company could at any time choose to announce an intention to sell a cement plant somewhere in the U.S. that RC Cement finds to be a more desirable investment commercially than it finds the Chattanooga Plant. The occurrence of this or some other unforeseeable event prior to the sale of the Chattanooga Plant could lead RC Cement to back out of the acquisition or prevent GP from finding other buyers within the 18-month time period in the Consent Order. Moreover, even if alternative buyers can be found at all within this time period, there can be no assurance that the buyers would be as acceptable to the Commission or as likely to be a pro-competitive force in the Chattanooga Plant's market as will be RC Cement.

Third, the greater the delay before GP can sell the Chattanooga Plant, the greater the risk that competitors of the Chattanooga Plant

may be able to persuade members of GP's excellent sales and supervisory team at this facility to leave GP and go to work for them. To date, GP has been able to keep its sales and marketing team at the Chattanooga Plant together, despite their natural concern and uncertainties over their future. These personnel—the key to competitive success of any cement plant—have known that their plant was going to be sold to a new buyer for over six months now. GP does not know how long it will be able to continue to hold its team together successfully.

The importance of the sales and marketing team to RC Cement is unmistakably clear, as seen in Paragraph 10 of the letter of intent which provides in part:

> It must be exphasized that any key sales and supervisory personnel who might be contemplating leaving GP's employ will not give GP any warning of their intention. At any time, GP may simply receive notice from such personnel that they will be leaving. The longer the delays, the more possible the loss of key sales and supervisory personnel who are uncertain and worried about their personal futures.

Fourth, the greater the delays, the greater the risk that major clients may be lost, with as little warning as a loss of key personnel. The cement industry is founded to a considerable degree on personal relationships and GP understands that its competitors are soliciting its customers on the basis of the uncertainty of the future of the Chattanooga Plant, who will ultimately own it, how reliable a source of supply it will be, and similar doubts.

GP must emphasize that if any of these risks actually occur, it may severely harm the competitive ability of the Chattanooga Plant, as well as GP's ability to find a buyer acceptable to the Commission. Once harmed, restoring the competitive health of the Chattanooga Plant may be both difficult and time consuming.

GP also wishes to point out that it has been doing precisely what it knows the Commission staff wants here and what GP believes the Commission will want: find a desirable, viable buyer for the Chattanooga Plant quickly and in a manner which protects the Chattanooga Plant's competitive abilities. Losing this sale to RC Cement may well engender loss of all or most of the Consent Order's 18-month period in which GP must find another buyer, indeed even if such a buyer can be found at all. Moreover, it may develop that the only buyers interested in the Chattanooga Plant would not be as acceptable to the Commission or be as pro-competitive a force in the Chattanooga Plant's market as would be RC Cement.

D. *Conclusion.*

In making this application, GP is not asking the Commission to predetermine whether or not it will ultimately issue the Consent

Order. It is not asking that the Commission staff or the Commission itself cut short their analysis of the desirability of RC Cement or its newly-formed affiliate as a desirable buyer for the Chattanooga Plant. Finally, it is not seeking to truncate or frustrate the ability of the public to consider the sale of the Chattanooga Plant or to comment on it, within a 30-day public comment period.

GP is simply asking the Commission to give it an advisory opinion to the effect that *if* the Commission ultimately issues a consent order containing Articles I through IV of the Consent Order, then RC Cement or its newly-formed affiliate will be an approved buyer thereunder and the prior sale of the Chattanooga Plant to them will satisfy the provisions of Articles I through IV of the Consent Order. GP is simply asking the Commission staff and the Commission to conclude its analysis of the sale on an expeditious basis and to render its advice prior to June 30. Finally, GP is willing to have the proposed sale of the Chattanooga Plant put on the public record for a 30-day public comment period (even though the Rules dealing with requests for advisory opinions do not require this) in order to give the public time to consider and comment on the sale.

In the event that the Commission renders a positive advisory opinion, GP will be in a position to sell the Chattanooga Plant to RC Cement or its newly-formed affiliate, accepting the risk that the Commission might ultimately reject the Consent Order. In such a case, GP might find that it has sold the Chattanooga Plant unnecessarily. Nevertheless, the risk of this would be one acceptable to GP, especially when compared to the risks inherent in delaying the sale by several additional months by awaiting final action on the Consent Order.

E. *Confidentiality.*

GP respectfully requests that the confidential material included in Exhibit 1 and the names of the possible minority European shareholders in the newly-formed RC Cement affiliate described herein be accorded confidential treatment under the FTC Improvements Act of 1980 and the Commission's Rules, for the reasons set forth in Exhibit 1.

Respectfully submitted,

/s/ Louis Munin

Senior Vice President and
Chief Financial Officer
General Portland Inc.

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